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In The

Supreme Court of the United States

October Term, 1997

CITY OF CINCINNATI; ROXANNE QUALLS, Councilmember and Mayor of the City of Cincinnati; DWIGHT TILLERY, Councilmember; TYRONE YATES, Councilmember; TODD PORTUNE, Councilmember; BOBBIE STERNE, Councilmember; PHILIP M. HEIMLICH, Councilmember; MINETTE J. COOPER, Councilmember; THOMAS A. LUKEN, Councilmember; NICHOLAS J. VEHR, Councilmember; CHARLES WINBURN, Councilmember; JOHN F. SHIREY, City Manager of the City of Cincinnati,

Petitioners,

v.

JOHN R. KRUSE; KRUSE FOR COUNCIL COMMITTEE; THOMAS E. BRINKMAN, JR.; MARK W. MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN C. BONIFAZ
Counsel of Record
BRENDA WRIGHT
GREGORY G. LUKE
National Voting Rights Institute
294 Washington Street
Suite 713
Boston, Massachusetts 02108
(617) 368-9100 Phone
(617) 368-9101 Fax

FAY D. DUPUIS
City Solicitor
KARL P. KADON, III
Deputy City Solicitor
The City of Cincinnati
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3333 Phone
(513) 352-1515 Fax

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

94pp

QUESTIONS PRESENTED

1. Whether, consistent with this Court's ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), states and municipalities may enact campaign spending limits for their elections upon proof of new facts and circumstances not available nor presented to the *Buckley* Court which establish that compelling governmental interests justify the limits.

2. Whether, if the Court of Appeals for the Sixth Circuit correctly read *Buckley* to hold that all campaign spending limits are *per se* unconstitutional, *Buckley* should now be overruled to permit a showing at trial of new facts and circumstances and new compelling governmental interests which justify such limits.

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

In addition to the Petitioners and Respondents as listed in the caption, the following parties participated in the proceedings below:

Defendant-Intervenors Charter Committee of Greater Cincinnati, Hamilton County Democratic Party, and A. Matthew Rosen; and

Defendant-Intervenors African-American Small Business Committee PAC and Barbara Milon.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, the Petitioner City of Cincinnati hereby states that it is a municipal corporation. It has no parent company nor does it have any subsidiaries or affiliated corporations.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 142 F.3d 907 (6th Cir. 1998), and is reprinted in the Appendix to this petition at App. 1-32. The opinion of the District Court for the Southern District of Ohio is unpublished and is reprinted at App. 33-49.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on April 27, 1998 and denied Defendants-Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc on June 18, 1998. App. 50-51. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . . "

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . "

City of Cincinnati Ordinance 240-1995 is reprinted in the Appendix at App. 52-56.

STATEMENT OF THE CASE

In July 1995, following twenty months of study and deliberation, the Cincinnati City Council enacted limits on campaign expenditures in city council elections. App. 52-56. The city council set the limits at the level of three times the annual salary for a city councilmember, a level of approximately $140,000.[1] App. 54. The City enacted the limits to address a pervasive public perception of corruption in its local election process and in its local government, a crisis in public confidence fueled by the City's system of unlimited campaign spending.[2] Further, the City enacted the limits to address an increasing threat of actual corruption resulting from the rising costs of city council campaigns.[3] The City's action drew, in part, on the two decades of federal election experience demonstrating that contribution limits alone are insufficient for

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[1] In November 1995, the city council also enacted limits on campaign contributions in city council elections. The contribution limits include a $1,000 limit on individuals and a $2,500 limit on political action committees and campaign committees. City of Cincinnati Ordinance No. 336-1995, amended by Ordinance No. 9-1997.

[2] R.No.38, Exh.1, Statement of Facts, 10-12 ("Statement of Facts"); Exh.4, Affidavit of John D. Deardourff, 1-17 ("Deardourff Aff."). The full record in the District Court will be referred to as "R."

[3] R.No.38, Statement of Facts, 1-5; Exh.3, Affidavit of Larry Makinson, 1-7 ("Makinson Aff.").

addressing the important governmental interest of preventing corruption and the appearance of corruption in the electoral process.[4]

The City also enacted the campaign spending limits to address two new compelling governmental interests. First, the City has an interest in freeing its elected officials from the pressures of fundraising to ensure that they are able to carry out their representative duties without interference.[5] Second, the Cincinnati experience of unlimited campaign spending includes a unique "black-out" phenomenon with respect to television advertising time. City council candidates with large sums of money early in the election season have been able, through excessive television advertising purchases, effectively to preempt other less well-funded candidates from broadcasting their messages on prime-time television in the critical weeks leading to election day. The City's limits address its interest in preventing some city council candidates from blocking other candidates' access to key television advertising time.[6]

In March 1996, Respondent John R. Kruse, an unsuccessful city council candidate, his political committee,

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[4] R.No.38, Exh.7, Affidavit of Bobbie L. Sterne, 4-5 ("Sterne Aff.").

[5] R.No.38, Exh.6, Attachments to Affidavit of Todd B. Portune: Final Report of the Campaign Finance Advisory Board, 4 ("Advisory Board Report"); Report of the League of Women Voters of the Cincinnati Area, 1 ("League of Women Voters Report"); Exh.11, Affidavit of Rev. Kazava Smith, 4 ("Smith Aff.").

[6] R.No.38, Statement of Facts, 13; R.No.37, Affidavit of Jerry Galvin ("Galvin Aff.").

and two financial contributors to Cincinnati city council campaigns filed a complaint in the U.S. District Court for the Southern District of Ohio, alleging that Cincinnati's campaign spending limits ordinance violated their First and Fourteenth Amendment rights. Respondents named as defendants (Petitioners) the City of Cincinnati, the mayor, each of the nine councilmembers, and the city manager. R.No.3, Respondents' Amended Complaint.

A. Statement Of Facts

The Cincinnati city council's vote in July 1995 approving Ordinance 240-1995 marked a culmination of more than twenty months of legislative debate and citizen input. The record demonstrates that the city council enacted the campaign spending limits to address its interest in preventing corruption and the appearance of corruption in the local election process; in freeing its elected officials from the pressures of fundraising so as to ensure that they are able to carry out their representative duties without interference; and in preventing some city council candidates from blocking other candidates' access to key television advertising time.[7]

In the district court proceedings, the City of Cincinnati, in its opposition to Respondents' motion for summary judgment, presented a factual record demonstrating new facts and circumstances which justify the City's campaign spending limits and which warrant a trial at which

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[7] R.No.38, Statement of Facts; Deardourff Aff.; Makinson Aff.; Advisory Board Report; League of Women Voters Report; Smith Aff.; R.No.37, Galvin Aff.

the district court could properly weigh the evidence demonstrating the necessity of the limits. This record includes the following facts:

- In the past several election cycles, the City of Cincinnati has witnessed a dramatic rise in the cost of Cincinnati city council campaigns. The highest candidate expenditure for a winning campaign has increased by more than 480 percent, rising from $75,000 in 1989 to $362,000 in 1995. R.No.38, Makinson Aff., 4.

- The rise in the overall cost of Cincinnati city council races has caused a corresponding rise in the influence of wealthy donors in Cincinnati's elections. From 1991 to 1995, one-third of one percent of the metropolitan area's population provided more than $3.9 million in campaign contributions to city council candidates, amounting to nearly 70% of all the money raised by those candidates. *Id.* at 6-7.

- The public perception in Cincinnati, shared by an overwhelming majority of Cincinnati residents, is that "large campaign contributors wield undue influence on the political system." That same overwhelming majority state that "[t]he amount of money in election campaigns has caused [them] to lose a great deal of faith in the political system." Cincinnati residents "firmly believe that their own and others' level of trust in the integrity of the political system has been eroded by the

amount of money in politics." R.No.38, Deardourff Aff., 7, 9-10.[8]

- The rising costs of Cincinnati's city council campaigns causes city councilmembers to spend increasing amounts of time raising money for the next election, which interferes with their responsibilities for governing the city. This consequence of unlimited campaign spending further fuels the erosion of public confidence in Cincinnati in its local election process and in its local government. *Supra* note 5.

- The system of unlimited campaign spending in Cincinnati city council elections has caused a "black-out" phenomenon with respect to television advertising time. The policy of local television broadcasters in Cincinnati is to sell television advertising spots on a first-come, first-serve basis. Because there is a limited supply of the most valuable advertising spots available on local television, city council candidates with significant quantities of campaign funds early in a campaign season have been able to preempt effectively the right of other, less well-

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[8] An overwhelming majority of Cincinnati residents further believe that unlimited campaign spending: 1) discourages potential candidates from running for public office, thereby narrowing the range of choices available to voters; 2) prevents the electorate from hearing some campaign messages among candidates who do run, thus depriving voters of information relevant to their voting decisions; and 3) discourages people from voting and participating in the political process. R.No.38, Deardourff Aff., 15.

funded candidates to purchase such advertising time. *Supra* note 6.

- Candidates for Cincinnati city council can run a viable campaign spending less than $140,000, the limit set in Cincinnati Ordinance 240-1995. Of the nine winning Cincinnati city council candidates in the 1995 elections, four won election spending less than $140,000, including one who spent only $33,000 and a challenger candidate who spent $97,000. R.No.38, Statement of Facts, 12.

B. The Lower Court Decisions

(1) The District Court Ruling

Respondents filed a motion for summary judgment on July 5, 1996, arguing that Cincinnati's campaign spending limits are *per se* unconstitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976).

At a November 18, 1996 scheduling conference, all parties jointly stipulated to a preliminary injunction which enjoined enforcement of the ordinance during the litigation.[9] In urging a decision on summary judgment, the Respondents agreed to stipulate that any and all facts

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[9] In addition to the Petitioners City of Cincinnati, et al. and the Respondents, the parties included two sets of defendant-intervenors: the Charter Committee of Greater Cincinnati, the Hamilton County Democratic Party, and a former city council candidate; and the African American Small Business PAC and a former city council candidate.

set forth by the City in defense of its ordinance are true for the purposes of its motion for summary judgment.[10]

At the close of oral argument on January 31, 1997, the District Court issued an oral opinion and final judgment granting the Respondents' motion for summary judgment and declaring the City's ordinance unconstitutional under *Buckley*. App. 33-49. The Court stated, however, its belief that the ordinance's $140,000 limit is "more than reasonable" for a Cincinnati city council election. App. 39.

(2) The Sixth Circuit Ruling

The Petitioners appealed the District Court's ruling to the United States Court of Appeals for the Sixth Circuit. The City of Cincinnati emphasized in its appeal, as it did before the district court, that it seeks only the opportunity to prove at trial that its campaign spending limits are necessary to address its compelling governmental

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[10] Counsel for Respondents informed the district court at the November 18, 1996 scheduling conference that "[w]e want you to presume that at trial [the City of Cincinnati] can prove x at trial and [the City of Cincinnati] can prove y and at trial [the City of Cincinnati] can prove z. And [the City of Cincinnati] can make that list as long as [it] wants. [The City of Cincinnati] can say anything [it] wants if [it] thinks [it] can prove it at trial. For purposes of our motion for summary judgment, we want you to presume that every fact that [the City of Cincinnati] says that [it] can prove, that [it] in fact will prove at trial." R.No.38, Exh.2.

interests.[11] On April 27, 1998, a three-judge panel of the Sixth Circuit denied the City that opportunity and affirmed the District Court's ruling. App. 1-32.

A majority of the Sixth Circuit panel held that, under this Court's decisions in *Buckley, Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985) ("*NC-PAC*") and *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 116 S. Ct. 2309 (1996) ("*Colorado Republican*"), Cincinnati's campaign spending limits are *per se* unconstitutional. App. 18-20. Further, the panel ruled that, were it to consider the factual record, the City did not demonstrate that campaign spending limits are necessary to address the compelling governmental interest of preventing corruption and the appearance of corruption in the electoral process. App. 20. The panel held that Cincinnati could not rely on the twenty-two years of federal election experience with contribution limits to demonstrate that such limits working alone are insufficient for addressing that interest. *Id.* The panel stated its view — unsupported by

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[11] The standard for review of a motion for summary judgment is well-settled. As this Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986):

> A case is ripe for summary judgment when there exists no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact is present if the evidence is such that a reasonable jury could return a verdict for the non-moving party . . . In reaching its conclusion, the court must resolve all significant doubt over factual issues, if any, in favor of the non-movant and draw all reasonable inferences against the moving party's motion.

the facts in the record — that the ineffectiveness of contribution limits in federal elections is "explained primarily by the 'soft-money' loophole." App. 20-21 (citing Note, *Soft Money: The Current Rules and the Case for Reform,* 111 Harv. L. Rev. 1323 (1998)).

The panel also held that Cincinnati could not go to trial to prove that its campaign spending limits are justified by a new and compelling governmental interest in freeing the City's elected officials from the pressures of fundraising. App. 22-23. The panel admitted that the time a candidate must spend raising money for her campaign "detracts an officeholder from doing her job," App. 23, but it nonetheless ruled that the interest in reducing the time elected officials spend on fundraising "cannot serve as a basis for limiting campaign spending." *Id.*

The panel's opinion does not address the City's argument that its campaign spending limits are also justified by a new and compelling governmental interest in preventing some city council candidates from blocking other candidates' access to key television advertising time.

U.S. District Judge Avern Cohn[12] issued a concurring opinion. App. 29-32. While joining the majority's affirmance of the District Court's ruling, Judge Cohn disagreed with the majority's reading of *Buckley* with respect to campaign spending limits: "The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional." App. 31-32.

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[12] United States District Judge for the Eastern District of Michigan, sitting by designation.

REASONS FOR GRANTING THE WRIT

This case is of the utmost importance to the nation and to the state of American democracy. In the twenty-two years since this Court's ruling in *Buckley v. Valeo*, the United States has witnessed an explosion of campaign spending in federal elections, with the 1996 election cycle marking the most expensive election yet in U.S. history.[13] Campaign spending has also dramatically risen in state and local elections across the country.[14] This unlimited spending has seriously undermined public confidence in our electoral process and in our democratic institutions.[15] It has presented an increased threat of actual corruption as large contributors dominate the financing of public election campaigns.[16] It has placed enormous time pressures on officeholders running for re-election, interfering with their ability to carry out their governing duties.[17]

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[13] Ruth Marcus & Charles Babcock, "The System Cracks Under Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record $2.7 Billion," *The Washington Post*, February 9, 1997, A1 ("Marcus and Babcock").

[14] Kevin Sack, "High Stakes and Higher Antes in Statehouse Races," *The New York Times*, September 6, 1998, A1.

[15] Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our American Democracy*, 94 Colum. L. Rev. 1126-1131 (1994).

[16] *Id.* at 1131-1142; Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 Yale L. & Pol'y Rev. 273, 293-297, 326-328 (1993) ("Raskin and Bonifaz"); Charles Lewis and The Center for Public Integrity, *The Buying of the Congress* (1998).

[17] Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994).

At issue in this case is whether states and municipalities, in the face of new facts and circumstances associated with unlimited campaign spending, may employ reasonable campaign spending limits to protect the integrity of their elections and their governments. Like the Petitioner City of Cincinnati, other jurisdictions have applied this remedy to address the dangers resulting from unlimited campaign spending. Last year, the State of Vermont enacted campaign spending limits for its state elections, to take effect in the 2000 election cycle.[18] Since 1974, the City of Albuquerque has maintained limits on campaign expenditures for its local elections.[19] In July 1995, the Supreme Court of Ohio revised its judicial code of ethics to set campaign spending limits for that state's judicial elections.[20]

The Sixth Circuit's ruling endangers the ability of states and municipalities to respond to serious threats to their democratic processes.[21] Under this ruling, no set of

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[18] Vt. Stat. Ann. 17, § 2805a (effective November 4, 1998).

[19] Albuquerque, N.M. Charter, art. XIII, Election Code, § 4.

[20] Supreme Court of Ohio Code of Judicial Conduct, Canon VII(C)(6). The Sixth Circuit recently affirmed a district court ruling invalidating the judicial campaign spending limits on First Amendment grounds. *Suster v. Marshall*, 1998 U.S.App. LEXIS 17445. The Sixth Circuit held that, according to *Buckley*, campaign finance regulation can only be justified by the compelling governmental interest of preventing corruption and the appearance of corruption in the electoral process. The panel thus rejected the state supreme court's defense of its spending limits as justified by a new compelling governmental interest in protecting the impartiality and the appearance of impartiality of the state judiciary. *Id.* at *27.

[21] The United States Congress has also demonstrated interest in employing campaign spending limits for federal

facts can ever be proved which would demonstrate the necessity for campaign spending limits. Under this ruling, no new and compelling governmental interests can ever be considered that might justify campaign spending limits.

The Sixth Circuit's ruling conflicts with *Buckley*. This Court in *Buckley* did not close the door to proof of any and all new facts and circumstances and any and all new compelling governmental interests which would justify campaign spending limits. *Buckley*, 424 U.S. at 55-56. This case presents new facts and circumstances demonstrating that contribution limits alone have proven insufficient for addressing the compelling governmental interest of preventing corruption and the appearance of corruption in the electoral process. This case also presents new and compelling governmental interests which justify campaign spending limits.

In the alternative, if *Buckley* did hold that campaign spending limits are *per se* unconstitutional, this Court should now revisit that ruling. The facts do matter. A ruling forever closing the door to the lessons of governmental experience with unlimited campaign spending runs contrary to the constitutional responsibilities of this Court. As this Court stated in *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992):

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elections. Members of Congress have introduced campaign spending limit bills eleven times since this Court's ruling in *Buckley*. S.1684 and S.1185 (98th Congress); S.59 (99th Congress); H.R.2473 (100th Congress); H.R.1456 (101st Congress); H.Res. 168 and H.R.3571 (103rd Congress); H.R.3651 and H.R.3658 (104th Congress); and S.1057 and H.R.77 (105th Congress).

> In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

This Court should grant the petition for certiorari to correct the Sixth Circuit's erroneous reading of *Buckley* and to resolve the critical question of whether state and local governments can ever determine that campaign spending limits are necessary to address serious threats to the democratic process.

I. THE RULING BELOW CONFLICTS WITH *BUCKLEY V. VALEO*

A. This Court in *Buckley* Did Not Hold That No New Facts and Circumstances Could Ever Be Proved Which Would Demonstrate the Necessity for Campaign Spending Limits

In *Buckley*, this Court upheld congressional limits on campaign contributions in federal elections as justified by the sufficiently important governmental interests of preventing corruption and the appearance of corruption. *Buckley*, 424 U.S. at 23-38. In assessing the constitutionality of congressional limits on campaign expenditures in federal elections, this Court found, on the record before it, that the contribution limits alone would be sufficient for addressing such governmental interests. While the appellate court had ruled that "the expenditure

restrictions are necessary to reduce the incentive to circumvent direct contribution limits,"[22] this Court found:

> There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions. *Buckley*, 424 U.S. at 55-56.

This pivotal passage from *Buckley* unambiguously reveals that a key empirical judgment — drawn from the record — ultimately determined the constitutionality of the congressional campaign spending limits. For what if the record in *Buckley* had established that the "substantial criminal penalties" and the "political repercussion" were not sufficient to "police the contribution provisions"? Clearly, *Buckley* leaves the door open for a different factual record which would justify the need for campaign spending limits.

The Sixth Circuit panel's opinion misreads this crucial aspect of the *Buckley* ruling. It also misapplies this Court's holdings in *NC-PAC* and in *Colorado Republican* to this case. The panel states:

> We are not unaware of the excesses of the federal campaign system. However, to the extent the City is relying on its interest in preventing real and perceived quid pro quo corruption, the Supreme Court's decisions in *Buckley*, *NC-PAC* and *Colorado Republican* clearly foreclose this argument as a matter of law. App. 18-19.

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[22] *Buckley*, 519 F.2d 817, 859 (D.C. Cir. 1975).

As demonstrated above, the argument that campaign spending limits are a necessary concomitant to contribution limits was rejected by the *Buckley* Court only as a *matter of fact*. There is no other way of reading the Court's pivotal passage on this point. Further, *NC-PAC* and *Colorado Republican* address spending limits on *independent expenditures* by political action committees and by political parties, *not* spending limits on expenditures by and coordinated with candidate campaigns. This case is the first case since *Buckley* to raise the question of spending limits on campaign expenditures by candidates. Even if *NC-PAC* and *Colorado Republican* were to be interpreted as foreclosing such an argument as a matter of law with respect to limits on independent expenditures by PACs and by political parties,[23] the factually contingent nature of this Court's ruling in *Buckley* on spending limits on campaign expenditures would not change.

Further, this Court decided *Buckley* on a limited factual record, a consequence of a provision for expedited judicial review included in the 1974 amendments to the Federal Election Campaign Act. 2 USC § 437h. That provision effectively precluded any possibility for trial and,

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[23] The panel's own citation to *Colorado Republican* demonstrates the factually contingent nature of the Supreme Court's ruling in that case: "As the Court reasoned in *Colorado Republican*, 'the lack of coordination between the candidate and the source of the expenditure . . . prevents us from assuming, *absent convincing evidence to the contrary*, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption in the electoral system.' " App. 19, quoting *Colorado Republican*, 116 S. Ct. at 2316-17 (emphasis added).

therefore, the summary judgment standard was not applicable in *Buckley*. The record in this case, at this summary judgment stage, is different. It presents new facts and circumstances which demonstrate the necessity for campaign spending limits to address Cincinnati's interest in preventing corruption and the appearance of corruption in the electoral process.

The City's expert, John Deardourff, a public opinion researcher with more than 30 years of experience, testified in his affidavit to a pervasive public perception of corruption in Cincinnati with respect to the city council election process. R.No.38, Deardourff Aff. The City demonstrated, through Mr. Deardourff's testimony, that this crisis in public confidence in Cincinnati with respect to the political system is directly tied to unlimited campaign spending.[24]

In holding that the congressional limits on campaign contributions were justified by Congress' interest in preventing corruption and the appearance of corruption, the *Buckley* Court specifically cited the dangers associated with public perception of corruption. This Court held that

> Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to

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[24] Cincinnati residents "firmly believe that their own and others' level of trust in the integrity of the political system has been eroded by the amount of money in politics." R.No.38, Deardourff Aff., 9. An overwhelming majority of Cincinnati residents agree with the statement, "The amount of money in election campaigns has caused me to lose a great deal of faith in the political system." *Id.* at 10.

> be eroded to a disastrous extent.' " *Buckley*, 424 U.S. at 27, citing *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973).

The expert evidence in this record demonstrates that public confidence in the system of representative government in Cincinnati has been "eroded to a disastrous extent," and that contribution limits alone are insufficient to address this public perception of corruption.

The City has also presented crucial expert testimony that "the rise in the overall cost of city council races *has caused* a rise in the influence of wealthy donors in the City's elections, with such donors increasingly dominating the campaign fundraising process." R.No.38, Makinson Aff., 6-7 (emphasis added). From 1991 to 1995, one-third of one percent of the metropolitan area's population provided more than $3.9 million in campaign contributions to city council candidates, amounting to nearly 70% of all the money raised by those candidates. *Id.* at 6. The *Buckley* Court did not hear this critical evidence linking unlimited campaign spending with a corresponding rise in the influence of wealthy donors in elections.

Like Cincinnati, the nation as a whole has witnessed the harmful impact of unlimited campaign spending in elections. In the twenty-two years since *Buckley*, the federal election experience has demonstrated that contribution limits will not, alone, sufficiently address the problem of corruption and the appearance of corruption in the electoral process. The federal experience teaches that, in a system of campaign contribution limits but unlimited campaign spending, large campaign donors will often bundle their contributions, leading to undue

influence on the electoral and legislative processes.[25] Further, the fear that an opponent will spend vast sums of money in pursuit of a campaign victory has fueled a never-ending set of schemes to evade the federal limits. During the most recent federal election, limits on contributions were rendered meaningless by the pressure of increasing levels of spending. The result was a campaign finance system characterized by monied interest contributions in the millions of dollars.[26]

The Sixth Circuit panel held that Cincinnati could not rely upon this federal election experience with contribution limits to bolster its studied conclusion that contribution limits alone are ineffective to prevent corruption and the appearance of corruption. The panel stated: "The City mistakenly relies on the federal experience in national elections with contribution limitations to support its contention that they will inevitably prove inadequate at the local level." App. 20.

The Sixth Circuit's ruling runs counter to the very essence of the governing process. As this Court held in *Renton v. Playtime Theatres, Inc.*, 474 U.S. 41, 51-52 (1986), cities may rely on the experiences of other jurisdictions in

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[25] Raskin and Bonifaz, 326-327 (citing Larry Makinson, *Open Secrets: The Encyclopedia of Congressional Money & Politics* (2d ed. 1992)).

[26] *See* Marcus & Babcock; and Brian McGrory, et al., "Dawn to Dark/Chasing the Dollars: One Day on the Fundraising Trail," *The Boston Globe*, May 16, 1997, A1, A12, quoting U.S. Senator Robert Byrd of West Virginia in a March 1997 Senate floor speech: "The incessant money chase that permeates every crevice of our political system is like an unending circular marathon. And it is a race that sends a clear message to the people: that it is money, money, money that reigns supreme in American politics."

the development and enactment of new laws. Cincinnati need not repeat a failed experiment in order to demonstrate that it is a failure. "To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences and conditions before attempting to avoid them." *Wall Distributors, Inc. v. The City of Newport News, Virginia*, 782 F.2d 1165, 1169 n.7 (4th Cir. 1986).[27]

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[27] The Sixth Circuit compounds its error by seeking to explain the ineffectiveness of contribution limits in federal elections as resulting from the "soft-money" loophole. App. 20-21, citing Note, *Soft Money: The Current Rules and the Case for Reform*, 111 Harv. L. Rev. 1323 (1998). This claim is completely unsupported by the record in this case. It is a well-settled principle of law that, with the exception of judicially noticed facts, courts must rely only upon the record presented in making their decisions. *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 489 n.3 (1986).

Further, this analysis of the federal experience is wrong. "Soft money" is money raised by political parties in unlimited amounts for non-federal election purposes. Federal law prohibits the use of soft money to directly influence a federal campaign, "except when used in the limited, party-building activities specifically designated in the statute." *Colorado Republican*, 116 S.Ct. at 2313, citing 2 U.S.C. § 431(8)(B). While the abuses with the soft-money loophole are indeed significant and the current subject of national debate, they do not explain the insufficiency of contribution limits in federal candidate campaigns. Rather, as the City and the amici states have emphasized, large campaign donors, in a system of unlimited campaign spending, will often seek to evade contribution limits through the bundling of contributions.

The fact that the Sixth Circuit panel's view here is unsupported by the record only highlights why this case must go to trial for a proper weighing of the evidence.

With the new facts and circumstances in this record, Cincinnati clearly demonstrated its right to go to trial to prove that its campaign spending limits are necessary to address the compelling governmental interest of preventing corruption and the appearance of corruption in the electoral process. The Sixth Circuit ruling closing the door on this evidence should be reviewed by this Court.

B. This Court in *Buckley* Did Not Hold That No New and Compelling Governmental Interests Could Ever Be Presented Which Would Justify Campaign Spending Limits

This Court in *Buckley* did not hold that there could never be a new and compelling governmental interest that would justify campaign spending limits. Rather, this Court stated: "No governmental interest *that has been suggested* is sufficient to justify [the congressional campaign spending limits]." *Buckley*, 424 U.S. at 55 (emphasis added). The implication is clear. The door remains open to compelling governmental interests that were *not* suggested to the *Buckley* Court. This Court reaffirmed that point in *NC-PAC*, stating that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests *thus far* identified for restricting campaign finances." *NC-PAC*, 470 U.S. at 496-497 (emphasis added).

Cincinnati has presented two new and compelling governmental interests which justify its campaign spending limits. First, the City has an interest in freeing its elected officials from the pressures of fundraising to

ensure that they are able to carry out their representative duties without interference.

The increasing amount of time elected officials in Cincinnati spend raising money for their campaigns has fueled the erosion of public confidence in the democratic process. As the City's Campaign Finance Advisory Board found in its final report to the Cincinnati city council, the time candidates spend raising money is directly tied to the rising costs of city council campaigns. R.No.38, Advisory Board Report, 4. This new fact associated with unlimited campaign spending has a real and detrimental impact on the ability of elected officials to govern and gives rise to a new compelling interest justifying campaign spending limits.[28]

Further, twenty-two years of experience of unlimited campaign spending in federal elections provides added weight to a new compelling governmental interest in preserving the time of elected officials for carrying out their official duties. *See* Blasi at 1281: "Candidates for office spend too much time raising money. This is

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[28] *See* R.No.38, Smith Aff., 4: "[T]he high costs of City Council campaigns today causes our City Councilmembers to spend too much time raising money for the next election, rather than focusing on their responsibilities on governing the city;" R.No.38, League of Women Voters Report, 1: "More time than is reasonable is spent raising money for campaigns, which may interfere with time for governing." *See also* Blasi at 1283: "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives."

scarcely a controversial proposition." (citing sources on the burdens of fundraising in federal elections).[29]

The City has also presented a new and compelling governmental interest in preventing some city council candidates from blocking other candidates' access to key television advertising time. The record in this case identifies a new set of facts which show that, in Cincinnati, city council candidates with large sums of money early in the election season are able effectively to shut out other candidates from broadcasting their messages on prime time television in the critical weeks leading to election day — a black-out phenomenon.[30] The *Buckley* record did not include this crucial evidence.

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[29] *See also* Martin Schram, *Speaking Freely: Former Members of Congress Talk About Money in Politics* 37-46 (1995) (former Members of Congress discuss the enormous pressures of fundraising and its drain on their time for performing their official duties); Dan Clawson et al., *Money Talks: Corporate PACs and Political Influence* 7-8 (1992): "The quest for money is never ending . . . To pay for an average winning campaign, representatives need to raise $3,700 and senators $12,000 during *every week* of their term of office.") (emphasis in original); Philip M. Stern, *Still the Best Congress Money Can Buy* 119 (1992) (quoting former Congressman Bob Edgar, a Pennsylvania Democrat who resigned from the House to avoid another campaign fundraising cycle: "Eighty percent of my time, 80 percent of my staff's time, 80 percent of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise $3,000 or $4,000."); 138 Cong. Rec. S115 (daily ed. Jan. 6, 1987) (statement of U.S. Senator Robert Byrd of West Virginia): "To raise the money, Senators start hosting fund-raisers years before they next will be in an election. They all too often become fund-raisers first, and legislators second."

[30] *Supra* note 6.

As explained in the expert testimony of Jerry Galvin, an advertising executive with 28 years of experience in the creation and production of television advertisements for Cincinnati city council candidates, well-funded city council candidates engage in media campaigns which "have the effect of preempting the right of other less well-funded candidates from purchasing the most valuable advertising spots." R.No.38, Galvin Aff., 4. Candidates in Cincinnati make such excessive television advertising purchases in such a way as to "drown[ ] out" the campaigns of less well-funded candidates. *Id.* at 6. The City's campaign spending limits will break up this "effective monopoly on the most valuable advertising time." *Id.* at 5.

In the related First Amendment area of television broadcasting, this Court recently reaffirmed the governmental interest of promoting the widespread dissemination of information from a multiplicity of sources. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 117 S.Ct. 1174, 1189 (1997) (upholding the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992): "Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable." In the area of elections, Cincinnati surely has at least an equally important interest in preserving candidates' access to a key medium of communication to the voters during a crucial period in the election campaign.[31]

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[31] Cincinnati, of course, would not have the power to address this phenomenon by imposing "fairness" requirements

In his concurrence, Judge Cohn states his disagreement with the majority opinion's reading of *Buckley*. Judge Cohn writes:

> The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest. App. 31-32.[32]

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directly on the television stations, given the Federal Communications Commission's jurisdiction over regulation of broadcast media.

[32] While Judge Cohn correctly reads *Buckley* to have allowed for proof of new facts and circumstances and new and compelling governmental interests which would justify campaign spending limits, he errs in joining the majority's affirmance of the district court's granting of summary judgment. Judge Cohn points out that *Buckley* was decided on a slender factual record. He then states: "Similarly, although the City here attempted to develop a compelling factual record, it failed to do so." App. 29.

Judge Cohn does not apply the correct standard for summary judgment. Summary judgment can only be granted "when there exists no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Cincinnati presented genuine issues of material fact in this record. These genuine issues of material fact go directly to Judge Cohn's points on "the interest in freeing officeholders from the pressures of fundraising so they can perform their duties" and "the interest in preserving faith in our democracy." App. 31-32. Having made this showing, the City should have

The majority opinion's finding that campaign spending limits are *per se* unconstitutional conflicts with this Court's ruling in *Buckley*. It endangers the ability of state and local governments to address serious threats to their democracies resulting from unlimited campaign spending. It should be reviewed by this Court.

II. IF THE RULING BELOW DOES NOT CONFLICT WITH *BUCKLEY*, THIS COURT SHOULD REVISIT *BUCKLEY* IN LIGHT OF NEW FACTS AND CIRCUMSTANCES ASSOCIATED WITH UNLIMITED CAMPAIGN SPENDING

If *Buckley* does, in fact, stand for the proposition that all campaign spending limits are *per se* unconstitutional, the new facts and circumstances of this case merit this Court's reconsideration of that ruling.

This Court has recognized that a prior holding may require reexamination based on changed circumstances.

> In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992). *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978):

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been allowed its opportunity to go to trial to prove its case. It is precisely at trial, not at the summary judgment stage, where the City would be required to develop "a compelling factual record."

> According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. *Id.* at 789-90;

and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (overruling *Butler v. Thompson*, 341 U.S. 937 (1951 *per curiam*), and *Breedlove v. Suttles*, 302 U.S. 277 (1937), and invalidating a $1.50 poll tax as violative of the Equal Protection Clause):

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. *Harper*, 383 U.S. at 669 (emphasis in original).

If *Buckley* holds that campaign spending limits are *per se* unconstitutional and thus bars all consideration of newly developed facts, it renders meaningless the process of judicial scrutiny. The facts do matter, even under strict scrutiny analysis. As this Court stated in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995): "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980), MARSHALL, J., concurring in judgment).

A survey of this Court's rulings addressing campaign finance regulations since *Buckley* demonstrates the factually-intensive nature associated even with strict scrutiny analysis. For example, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), this Court applied a factual record developed at trial in upholding a Michigan statute limiting corporate expenditures in state elections. In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court reviewed the evidence presented at trial in striking down a Colorado law prohibiting paid circulators for initiative petitions. In *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981), this Court, in upholding FECA's limitations on individual contributions to political action committees, stated that the factual record supported the conclusion that the challenged limitations were necessary "to prevent circumvention of the very limitations on contributions upheld in *Buckley*." *Id.* at 197-98.

Strict scrutiny analysis still requires scrutiny. If *Buckley* closed the door — regardless of the facts — to any and all campaign spending limits, this Court should revisit that ruling.[33]

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[33] In the twenty-two years since *Buckley*, the ruling has generated considerable dissent from constitutional scholars. *See* Leslie Wayne, "Scholars Ask Court to Backtrack, Shutting Floodgates on Political Spending," *The New York Times*, November 10, 1996, A30; Ronald Dworkin, "The Curse of American Politics," *New York Review of Books*, October 17, 1996; Roland S. Homet, Jr., *Fact Finding in First Amendment Litigation: The Case of Campaign Finance Reform*, 21 Okla. City U.L. Rev. 97 (1996); Cass R. Sunstein, *Is Free Speech the Enemy of Democracy?*, Boston Rev., (Mar./Apr. 1993); Ray Forrester, *The New*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: September 15, 1998

Respectfully submitted,

JOHN C. BONIFAZ
Counsel of Record
BRENDA WRIGHT
GREGORY G. LUKE
National Voting Rights Institute
294 Washington Street, Suite 713
Boston, Massachusetts 02108
(617) 368-9100
(617) 368-9101 FAX

FAY D. DUPUIS
City Solicitor
KARL P. KADON, III
Deputy City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3334
(513) 352-1515 FAX

Attorneys for Petitioners

Constitutional Right to Buy Elections, 69 A.B.A.J. 1078, 1080 (1993); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum L. Rev. 611 (1982). The City of Cincinnati argues that *Buckley* allows for proof of new facts and circumstances and new compelling governmental interests which would justify campaign spending limits, such as the City has presented in this case. If, however, *Buckley* is to be read as declaring all campaign spending limits *per se* unconstitutional, the City shares the view of many constitutional scholars that this Court should overrule *Buckley*.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN R. KRUSE; KRUSE FOR COUNCIL COMMITTEE; THOMAS E. BRINKMAN, JR.; and MARK W. MILLER,	)	Nos. 97-3193/ 3194/ 3210
Plaintiffs-Appellees,	)	
v.	)	
CITY OF CINCINNATI; ROXANNE QUALLS, Councilmember and Mayor of the City of Cincinnati; DWIGHT TILLERY, Councilmember; TYRONE YATES, Councilmember; TODD PORTUNE, Councilmember; BOBBIE STERNE, Councilmember; PHILIP M. HEIMLICH, Councilmember; MINETTE J. COOPER, Councilmember; THOMAS A. LUKEN, Councilmember; NICHOLAS J. VEHR, Councilmember; CHARLES WINBURN, Councilmember; and JOHN F. SHIREY, City Manager of the City of Cincinnati,	)	
Defendants-Appellants (97-3194),	)	
CHARTER COMMITTEE OF GREATER CINCINNATI; HAMILTON COUNTY DEMOCRATIC PARTY; and A. MATTHEW ROSEN,	)	
Intervenor-Defendants-Appellants (97-3193),	)	
AFRICAN-AMERICAN SMALL BUSINESS COMMITTEE, PAC; and BARBARA MILON,	)	
Intervenor-Defendants-Appellants (97-3210).	)	

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 96-00252 – Herman J. Weber, District Judge.

Argued: March 17, 1998

Decided and Filed: April 27, 1998

Before: KENNEDY and SILER, Circuit Judges; COHN, District Judge.*

COUNSEL

ARGUED: Donald J. Mooney, Jr., BENESCH, FRIEDLANDER, COPLAN & ARONOFF, Cincinnati, Ohio, John C. Bonifaz, NATIONAL VOTING RIGHTS INSTITUTE, Boston, Massachusetts, for Appellants. Michael A. Carvin, COOPER, CARVIN & ROSENTHAL, Washington, D.C., for Appellees. **ON BRIEF:** Donald J. Mooney, Jr., BENESCH, FRIEDLANDER, COPLAN & ARONOFF, Cincinnati, Ohio, John C. Bonifaz, NATIONAL VOTING RIGHTS INSTITUTE, Boston, Massachusetts, Karl P. Kadon, III, CITY SOLICITOR'S OFFICE FOR THE CITY OF CINCINNATI, Cincinnati, Ohio, Eric H. Kearney, COHEN, TODD, KITE & STANFORD, Cincinnati, Ohio, for Appellants. Christopher Paul Finney, David R. Langdon, FINNEY, BACON & MUEHLENKAMP, Cincinnati, Ohio, for Appellees. Elizabeth M. Osenbaugh, DEPARTMENT OF JUSTICE, Des Moines, Iowa, Burt Neuborne, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, et al., New York, New York, for Amici Curiae.

KENNEDY, J., delivered the opinion of the court, in which SILER, J., joined. COHN, D. J. (pp. 26-28), delivered a separate concurring opinion.

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

KENNEDY, Circuit Judge. Defendants and intervenor-defendants appeal the District Court's judgment striking down City of Cincinnati Ordinance 240-1995 which places a $140,000 limit on city council campaign expenditures because it violates the First Amendment. The parties supporting the Ordinance[1] argue that the interests furthered by this campaign expenditure limitation are different in kind and degree from the governmental interests the Supreme Court considered and rejected as constitutionally insufficient in *Buckley v. Valeo*, 424 U.S. 1 (1976), and on that basis urge this Court to distinguish Buckley and uphold the Ordinance. Their characterizations to the contrary notwithstanding, the parties have not presented this Court with governmental interests different than those considered and rejected by the Supreme Court in *Buckley* and its progeny. We will therefore AFFIRM the decision of the District Court.

I. BACKGROUND

After witnessing a steady rise in the cost of running a successful campaign for city council,[2] the Cincinnati City

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[1] In addition to briefs filed by defendants and defendant-intervenors, amicus briefs urging reversal were filed on behalf of the Brennan Center for Justice and by 33 states through their attorneys general or secretaries of state, and the territory of Guam.

[2] In 1987, 25 city council candidates spent a total of $958,999. In 1995, 18 candidates spent a total of $2,330,000. The

Council passed City Ordinance 240-1995 (the "Ordinance"), which places a cap on campaign expenditures.[3] Under the Ordinance, a city council candidate cannot spend more than three times the annual salary of a Cincinnati councilmember, or, approximately $140,000 at the present time. The Ordinance provides in pertinent part:

> WHEREAS, it is the sense of the Council that limitations on campaign expenditures are the most effective means of promoting meaningful campaign reform; now, therefore,
>
> BE IT ORDAINED by the Council of the city of Cincinnati, state of Ohio:
>
> * * *
>
> Sec. 115-3. Expenditure[4] Limits.
>
> The total amount of expenditures made in the election cycle by a candidate or the campaign committee of a candidate for the council

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highest amount spent by a winning candidate increased by 482% from 1989, $75,000, to 1995, $362,000.

[3] By popular vote, the City amended its City Charter to give the City Council authority to enact campaign finance reform measures that differ from state law.

[4] "Expenditure" is defined as:

> the disbursement or use of either a contribution or personal funds of a candidate for the council or his or her immediate family on behalf of or for the benefit of the candidate for the purpose of advocating his or her election to the council or the defeat of his or her opponent. "Expenditure" does not include an independent expenditure, uncompensated volunteer services, or slate cards, sample ballots, or other publications of a political party that identify all of the candidates endorsed by the party in an election.

shall not exceed three times the annual compensation provided for the office to which a candidate seeks election.

The City Council passed the Ordinance despite the legal opinion of the City Solicitor that expenditure limits are unconstitutional under *Buckley*: "As we have previously advised the Council and the Campaign Finance Advisory Board,[5] the U.S. Supreme Court has found expenditure limits to be unconstitutional in the case of *Buckley v. Valeo,* [424 U.S. 1 (1976)]. The holding in this case remains the law on the subject of campaign expenditures and is directly on point as to legislative impositions of such expenditures." A majority of the Campaign Finance Advisory Board also counseled the City against enacting spending limits because of the authority of *Buckley*. Proponents of spending limits however believed that the City "should challenge" the decision and "take the lead on revisiting the Supreme Court's decision" by enacting spending limits.

In November, 1995, the City Council enacted Ordinance No. 336-1995 which placed limits on campaign contributions in city council elections and imposed disclosure requirements in addition to those imposed by state law.[6] The contribution restrictions comprise a $1,000

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[5] The Campaign Finance Advisory Board, composed of a "diverse group of political interests," was created to make recommendations on campaign finance reform in city council elections to the Council.

[6] This ordinance was repealed to make minor amendments; in 1997 a new ordinance was enacted which included the same contribution limitations and disclosure requirements. City of Cincinnati Ordinance No. 9-1997.

limit on individuals; a $2,500 limit on political action committees ("PACs") and campaign committees; and a $10,000 limit on political parties. The City placed no limitation on the amount of personal funds a candidate may contribute to the candidate's own campaign and no limits on independent expenditures.[7]

Plaintiffs John Kruse, a losing candidate in the 1995 city council election who spent more than $140,000 on his campaign; Kruse for Council Committee; Thomas E. Brinkman, a financial contributor to council candidates and potential council candidate; and Mark W. Miller, a financial contributor to council candidates (hereinafter collectively referred to as "Kruse") filed this action challenging the City's spending limit as facially unconstitutional. Kruse sued the City of Cincinnati, the City Manager and members of the City Council in their official capacities (hereinafter collectively referred to as the "City" or "defendants"). The Charter Committee of Greater Cincinnati;[8] the Hamilton County Democratic

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[7] "Independent expenditures" are "communications that in express terms advocate the election or defeat of a clearly identified candidate" and are not controlled or coordinated by that candidate. *Buckley*, 424 U.S. at 43-47.

[8] The Charter Committee originated in the 1920's, a result of the efforts of reformers to "rid Cincinnati of a corrupt political machine that controlled City government through Council members elected by wards and a directly-elected mayor" by creating a Charter system of government. Charter Comm. Br. at 7. Under the Charter system, Cincinnati councilmembers are elected at large on a non-partisan ballot; voters may elect to vote for up to 9 candidates in order of preference. The 9 top vote getters are elected to the Council and the top vote getter is elected mayor. *Id.* at 8.

Party; and A. Matthew Rosen, a former and prospective city council candidate (hereinafter collectively referred to as the "Charter Committee"), intervened on behalf of defendants. The African American Small Business Committee, PAC;[9] and Barbara Milon, an African American candidate for city council in 1993 (hereinafter collectively referred to as "AASBC-PAC"), also intervened on behalf of defendants.

The parties agreed to a preliminary injunction enjoining enforcement of the Ordinance throughout the litigation. Plaintiffs filed their motion for summary judgment on July 5, 1996. Defendants filed their opposition, which set forth the factual basis for the Council's action. Attachments included the results of a study, commissioned by the City, of the impact of money in Cincinnati city council elections. The study was conducted by the Center of Responsive Politics, a non-partisan, non-profit research organization that tracks campaign contributions in U.S. elections. It concluded that "the rise in the overall cost of city council races has caused a corresponding rise in the influence of wealthy donors in the City's elections, with such donors increasingly dominating the campaign financing process . . . and small donors . . . becoming marginal players in that process."

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[9] The African American Small Business Committee, PAC, is a political action committee in Hamilton County, Ohio, which has 2 purposes: "1) to seek, develop, and support candidates in elections in Hamilton County; and 2) to strengthen the influence and profitability of African American owned businesses in the political process." AASBC-PAC Br. at 5 n.2.

Defendants also attached the results of a public opinion survey which gauged the attitude of Cincinnatians on the subject of money in city council elections. The research project, which comprised focus groups and telephone surveys, was conducted by the Deardourff/The Media Company, a planning, consulting, and public opinion research firm. The researchers concluded that an overwhelming majority of residents believe that large contributors wield undue influence on the political system as a whole; that ordinary voters are unable to participate on equal footing in the process; that wealthy candidates unfairly drown out candidates with fewer resources; that the high costs of elections discourage qualified individuals from running for office, which deprives voters of a full choice of candidates; and that overall, money is undermining the fairness and integrity of the political system and causing them to lose faith in the democratic process.

Defendants also attached numerous affidavits from current and former councilmembers concerning the corrupting nature of money in Cincinnati politics and similar statements from groups such as the League of Women Voters and Common Cause. There were also affidavits relating to the ability of candidates to run a meaningful campaign on $140,000.

For purposes of the summary judgment motion, Kruse accepted as true all facts alleged by defendants in their opposition. Kruse argued that under any set of facts proven by defendants, the Ordinance still fails to pass constitutional muster. The District Court agreed and,

under the authority of *Buckley*, held the Ordinance unconstitutional on its face. Defendants and intervenor-defendants filed timely notices of appeal. We have jurisdiction under 28 U.S.C. § 1291. We review a grant of summary judgment *de novo*. *Bush v. Rauch*, 38 F.3d 842, 846 (6th Cir. 1994).

II. DISCUSSION

A. *Buckley* And Its Progeny

"The central holding in *Buckley v. Valeo*, 424 U.S. 1 . . . (1976) (per curiam), is that spending money on one's own speech must be permitted. . . . " *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 116 S. Ct. 2309, 2321 (1996) (Kennedy, J., joined by Rehnquist, C.J. and Scalia, J., concurring in part and dissenting in part) ("*Colo. Republican*")[10] (citing *Buckley*, 424 U.S. at 44-58; *see also*, *Buckley*, 424 U.S. at 266 ("The Court . . . holds that a candidate has a constitutional right to spend unlimited amounts of money . . . in order to be elected.") (White, J., dissenting). Any judicial consideration of the constitutionality of campaign finance reform legislation must begin and usually ends with the comprehensive decision in *Buckley*. The *Buckley* court considered constitutional

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[10] Justice Kennedy's opinion concurred in the judgment reached by the Court, which held that limitations on independent campaign expenditures by political parties violate the First Amendment. *Colo. Republican*, 116 S. Ct. at 2317 (Breyer, J., joined by O'Connor and Souter, JJ.). As explained below, Justice Kennedy would have reached the question of whether *coordinated* party expenditures can be regulated, which Justice Breyer declined to do.

challenges to several sections of the Federal Election Campaign Act of 1971, as amended by the Federal Election Campaign Act Amendments of 1974 (the "Act"). The legislation reformed federal campaign financing by, *inter alia*, placing limits on federal campaign contributions and expenditures. The *Buckley* court drew a general distinction between limitations on campaign contributions, which are constitutionally justified by the compelling state interest of preventing corruption and the appearance of corruption in the electoral process, and limitations on independent campaign expenditures, which are unconstitutional because they cannot be similarly justified. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 491 (1985) ("NC-PAC ") (generally so describing *Buckley*).

For our present purposes, we are most concerned with what the *Buckley* court had to say about limitations on campaign expenditures and infringement of First Amendment freedoms.

> The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 . . . (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York*, 333 U.S. 507, 510 . . . (1948), "there is practically

> universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . of course includ(ing) discussions of candidates. . . . " *Mills v. Alabama*, 384 U.S. 214, 218 . . . (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 . . . (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Buckley, 424 U.S. at 14-15. The Court, equating spending money with speech, determined that limitations on campaign expenditures directly and acutely impinged upon political expression at the heart of the First Amendment:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id. at 19.

1. Restrictions On Campaign Spending Will Be Strictly Scrutinized

Because expenditure limitations restrict political expression at the core of the electoral process and the First Amendment, the Court subjected the restrictions to "exacting scrutiny." *Id.* at 39, 44-45. Restrictions so burdening political speech can survive a constitutional attack only if justified by a compelling state interest, *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251-52 (1986) (citing *Buckley*, 424 U.S. at 44-45), and narrowly tailored to serve that interest, *NC-PAC*, 470 U.S. at 496. We reject the City's argument that a standard less rigorous than strict scrutiny should be used to review governmental restrictions of core First Amendment speech. *See, e.g.*, City of Cincinnati Br. at 13 n.2 (*Buckley* court never employed strict scrutiny language). The *Buckley* court explained that it was subjecting the Act's expenditure limitations to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45. Assuming, arguendo, *Buckley* left room for doubt surrounding the appropriate standard of review, the Supreme Court's subsequent cases cited above make clear that strict scrutiny applies. *See also, Colo. Republican*, 116 S. Ct. at 2328 (Thomas, J., dissenting) ("Curbs on protected speech, we have repeatedly said, must be strictly scrutinized.")

Neither is there support for the Charter Committee's contention that states have more latitude than the federal government in regulating the First Amendment expression of its citizens. Indeed, the Supreme Court has stated emphatically to the contrary: "[T]he proposition that the

several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States" is "firmly embedded in our constitutional jurisprudence." *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985). The Supreme Court has employed strict scrutiny when considering *state* restrictions on campaign expenditures. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) ("To determine whether Michigan's restriction on corporate political expenditures may constitutionally be applied to the Chamber, we must ascertain whether it burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest."); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) ("The constitutionality of [Massachusetts' restriction of corporate expenditures to influence the outcome of public referendums] turns on whether it can survive exacting scrutiny" which requires showing "closely drawn means" of furthering a "compelling" state interest.).

2. The Supreme Court Has Identified Only One Governmental Interest Supporting Campaign Finance Reform That Survives Strict Scrutiny

Thus far, the Supreme Court has identified only one "legitimate and compelling" governmental interest that justifies restrictions on campaign financing: the prevention of corruption or the appearance of corruption. *NCPAC*, 470 U.S. at 496-97. Corruption is defined as "a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by

the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." *Id.* at 497. Quid pro quo corruption – both real and perceived – was viewed as a malady so grave as to undermine "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27. The governmental interest in preventing real and perceived quid pro quo corruption provides a "constitutionally sufficient justification" to sustain limitations on contributions by individuals and groups to candidates and campaign committees. *Id.* at 26-29.[11]

In contrast, the Court found that this interest in preventing corruption and the appearance of corruption in the political system (the "anti-corruption rationale"[12]) is inadequate to sustain limitations on independent expenditures by individuals, *id.* at 45-47, expenditures of a candidate's own money, *id.* at 52-54, and most pertinent to our inquiry, campaign expenditures, *id.* at 55-56. The Court reasoned that spending limitations are not narrowly tailored to preventing corruption because the expenditures at issue did not pose the same potential for abuse as contributions. *Id.* at 46-47; 53; 55. The Court

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[11] As a corollary to this holding, the Court upheld the limitation on contributions by political committees, *Buckley*, 424 U.S. at 35-36, and the limitation on total contributions by any individual during any calendar year, *id.* at 38.

[12] *Colo. Republican*, 116 S. Ct. at 2331 (Thomas, J., dissenting) (citation omitted).

concluded that the Act's contribution limitations and disclosure requirements were the only constitutional means of furthering the anti-corruption rationale. *Id.* at 55-59.

Buckley's distinction between expenditure ceilings and contribution limits in candidate elections has remained intact.[13] Limitations on independent expenditures by PACs, *NC-PAC*, 470 U.S. at 496-97, and political parties, *Colo. Republican*, 116 S. Ct. at 2316-17, have been

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[13] There is one exception which is of no help to defendants. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Supreme Court upheld state-imposed restrictions on expenditures made by corporations on behalf of candidates. The Court identified a compelling interest other than the anti-corruption rationale: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas". *Id.* at 60. The basis for this holding hinges on the special and more limited nature of a *corporation's* First Amendment right to engage in political expression:

> [T]he mere fact that corporations may accumulate large amounts of wealth is not the justification [for the restriction]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support is [sic] restriction on independent expenditures by corporations.

Id. at 660. The holding in *Austin* is limited to the political speech of corporations and has no relevance here.

struck down. The lack of tendency in such expenditures to corrupt or give the appearance of corruption led the *NC-PAC* court to conclude there was no constitutional justification to restrict independent expenditures by PACs. *NC-PAC*, 470 U.S. at 496-97. Moreover, the Court held that even if it were to determine that independent expenditures by PACs posed a threat of corruption or the appearance of corruption, the expenditure limitation would be a "fatally overbroad response to that evil." *Id.* at 498. In *Colorado Republican*, the Court underscored its previous holdings in this area before striking down independent expenditures by political parties: "We do not see how a Constitution that grants to individuals, *candidates*, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." 116 S. Ct. at 2317 (emphasis supplied). A majority of the Court joined in holding independent expenditures immune from regulation as a matter of law.[14]

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[14] The Court was fractured on whether it should reach the question of the constitutionality of limitations on *coordinated* party expenditures. Justice Breyer declined to reach this issue. *Colo. Republican*, 116 S. Ct. at 2319-20. The Kennedy plurality found coordinated party expenditures indistinguishable from expenditures by a candidate or a candidate's committee. It reasoned that because the First Amendment does not permit regulation of the latter, it should not permit regulation of the former. *Id.* at 2323. Similarly, Justice Thomas would have reached the issue and struck down the limitation because "there is only a minimal threat of 'corruption,' as we have understood that term, when a political party spends to support its candidate or to oppose his competitor, whether or not that expenditure is made in concert with the candidate. . . . [The] heavy burden [of this regulation] on First Amendment rights is not justified by

3. Other Governmental Interests Supporting Campaign Finance Reform Are Insufficient To Justify Infringement Of First Amendment Freedoms

The *Buckley* court rejected two other governmental interests advanced by Congress as justification for spending caps. First, the Court held that the First Amendment will not countenance equalizing the financial resources of individuals and groups who wish to participate in the electoral process. *Buckley*, 424 U.S. at 48-49; 54; 56-57. Next, the Court rejected as illegitimate the government's interest in capping the exorbitant costs of political campaigns. *Id.* at 57.

Grounded on this legal landscape, we turn to the parties' arguments in defense of Ordinance 240-1995's limitation on campaign expenditures by candidates for city council.

B. *Buckley* And Its Progeny Cannot Be Distinguished And Are Controlling

1. Campaign Spending Does Not Implicate The Anti-Corruption Rationale

The City's main argument is that 20 years of experience has taught us that contribution limitations are not enough to address the problem of the corrupting influence of money in elections. In essence, the City argues that the *Buckley* court's empirical judgment was wrong. It

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the threat of corruption at which it is assertedly aimed." *Id.* at 2331.

cites to newspaper articles documenting the abuses in recent federal elections as proof of this contention.

> As has been demonstrated by the federal election experience over the past twenty-one years, large campaign donors, in a system of unlimited campaign spending, will often bundle their contributions, leading to undue influence on the electoral and legislative processes. Further, the fear that an opponent will spend vast sums of money in pursuit of a campaign victory has fueled a never-ending set of schemes to evade federal limits. During the most recent federal election, limits on contributions were rendered meaningless by the pressure of increasing levels of spending. The result was a campaign finance system characterized by monied interest contributions in the millions of dollars. Ruth Marcus & Charles Babcock, "The System Cracks under Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record $2.7 Billion.," *The Washington Post*, February 9, 1997, at A1.

City Br. at 26-27; see also *id.* at 30-31 and 31 n.5 ("As recent events in this nation have shown, contribution limits, alone, will not protect the integrity of the electoral process.") (citing Dawn to Dark/Chasing the Dollars: One Day on the [Federal] Fundraising Trail, *The Boston Globe*, May 16, 1997, A1).

We are not unaware of the excesses of the federal campaign system. However, to the extent the City is relying on its interest in preventing real and perceived

quid pro quo corruption,[15] the Supreme Court's decisions in *Buckley, NC-PAC* and *Colorado Republican* clearly foreclose this argument as a matter of law. *Buckley* could be narrowly interpreted to say only that spending limits are unconstitutional because contribution limits are adequate to prevent corruption and the appearance of corruption. *See, e.g., Buckley,* 424 U.S. at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [its] campaign expenditure ceilings."). This reading would leave open the question of what to do if contribution limits prove inadequate. However, *NC-PAC* and *Colorado Republican* make eminently clear that spending limits on PACs and political parties are unconstitutional not simply because of the presence of contribution limits but because they are not narrowly tailored to serve this interest. *NC-PAC,* 470 U.S. at 496-97; *Colo. Republican,* 116 S. Ct. at 2315-17. As the Court reasoned in *Colorado Republican,* "the lack of coordination between the candidate and the source of the expenditure [alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate and] . . . prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption to the electoral system." 116 S. Ct. at 2316-17. *A fortiori,* the

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[15] The City loosely refers to "corruption" and does not clearly define the type of corruption the Ordinance was aimed at eliminating.

spending of money legally raised by candidates themselves poses no risk of quid pro quo corruption and campaign spending limits cannot be justified by the anti-corruption rationale.

Any argument that spending limits are necessary to reduce the incentive to circumvent the limits on contributions was expressly rejected by the *Buckley* court.

> [Our earlier discussion] explains why the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations. The markedly greater burden on basic freedoms caused by [the expenditure limitations] thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations.

Buckley, 424 U.S. at 44.

Moreover, were we to consider the City's factual allegations, it has failed to present any evidence that spending limits are necessitated by the failure of contribution limits. The City had no experience with contribution limits at the local level at the time the spending limit was passed; contribution limits were not enacted until after the spending limit at issue here. As a result, the City has no evidence that contribution limits are inadequate to prevent actual and perceived quid pro quo corruption. The City mistakenly relies on the federal experience in national elections with contribution limitations to support its contention that they will inevitably prove inadequate at the local level. The problems uncovered on the federal level are explained primarily by the "soft-money"

loophole in contribution restrictions[16] and do not undermine the Supreme Court's conclusion that spending restrictions are not narrowly tailored to addressing the problem of the corrupting nature of money in politics.

Next, the parties argue that unlimited campaign spending is eroding the public's trust in city government and that pervasive cynicism is discouraging the public's participation in the democratic process. This is an outgrowth of the problems of actual and perceived quid pro quo corruption discussed at length above and of the inequalities of private economic power discussed below and therefore cannot provide constitutionally sufficient justification for campaign spending restrictions. We do not believe it can be severed as a "new" form of corruption the Supreme Court has not considered. Even if it could, as Kruse points out, it was advanced as a separate interest by the government in *Buckley*. See Kruse's Br. at 14 n.9 (interests advanced by the government as compelling include "the alienation from and disillusionment in the electoral process by this country's citizens") (quoting *Buckley v. Valeo*, 519 F.2d 821, 913 (D.C. Cir. 1975) (Tamm, J., concurring in part and dissenting in part)). While not separately addressed, the Supreme Court held that "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by" the ceiling on campaign expenditures. *Buckley*, 424 U.S. at 55.

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[16] For an explanation of the problems with soft money in federal elections see Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323 (1998).

2. The Interest In Curbing The Rising Costs Of Campaigns Is An Insufficient Justification For Spending Limits

The Brennan Center as amicus argues that the Ordinance is supported by a compelling governmental interest not considered by the *Buckley* court: "combating the demonstrated corrosive effects on the democratic process of uncontrollable campaign spending." The Brennan Center and the States as amici focus on the inordinate amount of time candidates for office and officeholders are forced to spend raising adequate funds for office, which in turn fosters such a pervasive level of public cynicism that people are losing faith in American democracy and staying away from the polls. This argument is also answered by *Buckley*. The Court held that the interest in "reducing the allegedly skyrocketing costs of political campaigns" is not compelling or sufficient to justify restrictions on campaign spending. *Buckley*, 424 U.S. at 57.

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. (footnote omitted). The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to

spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.

3. The Interest In Leveling The Playing Field Is An Insufficient Justification For Spending Limits

The City initially concedes that *Buckley* rejected the governmental interest in "equalizing the financial resources of candidates" as a matter of law. City Br. at 18. The City then proceeds to urge this Court to adopt this very interest rejected by the Supreme Court as compelling justification for its campaign spending limit. It frames this interest in a number of ways: 1) candidates without access to wealth are excluded from the electoral process; 2) voters are deprived of a full slate of candidates because otherwise qualified individuals are excluded from running by cost-prohibitive campaigns; 3) voters are deprived of hearing candidates with lesser resources because wealthy candidates effectively drown them out; and 4) voters without access to wealth cannot be heard by candidates because they are drowned out by contributors with more money and influence.

These arguments, all concerning or stemming from the notion that the government has an interest in eliminating the advantage of wealth in the electoral process, or "leveling the playing field," are directly rebutted by *Buckley:*

> It is argued . . . that the . . . governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of

> elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by [the Act's] expenditure ceiling[s]. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Buckley, 424 U.S. at 48-49 (internal quotations and citations omitted). The Court reasoned further that spending limits "may fail to promote financial equality among candidates" and could instead serve only to protect incumbents and "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *Id.* at 54, 56-57. More fundamentally, the Court concluded that "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy" whether the source of his money is personal wealth or funds raised from legal contributions. *Id.* at 54.

The City and intervenor-defendant AASBC-PAC frame purportedly different interests as issues implicating the First Amendment rights of relatively poor voters

and candidates and the Equal Protection rights of relatively poor and minority voters and candidates. These alleged constitutional interests however are actually the same interest in leveling the playing field just described.[17]

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[17] Recently, the Ninth Circuit rejected similar challenges to the state of California's campaign finance system for judicial elections. *NAACP v. Jones*, 131 F.3d 1317 (9th Cir.1997). Plaintiffs argued that a "wealth primary" exists in Los Angeles County's system of electing judges which precludes candidates without access to wealth from running a meaningful campaign and which prevents voters without access to wealth from contributing effectively to a candidate in violation of voters' and candidates' rights under the First Amendment and the Equal Protection Clause. The court rejected the equal protection argument that all voters are entitled to the same access to the campaigning process regardless of wealth. "We refuse to attribute societal differences in income or the high cost of running a judicial campaign to the State. . . . The inability to influence other peoples' votes through campaign contributions is not equivalent to the inability to cast one's own vote. . . . [There is no right] to have equal access to the campaigning process." *Id.* at 1323-24.

The court also rejected plaintiffs' First Amendment argument. It held that the First Amendment rights of voters can be no greater than those of the speaker, i.e., the candidate. *Id.* at 1322. Because the court rejected plaintiffs' argument that candidates have a First Amendment right to public funding, *id.* at 1322, it rejected the voters' argument as well. "The First Amendment simply does not guarantee access to all of the information a voter would like to receive. . . . The 'wealth primary' does not burden any fundamental First Amendment rights." *Id.* at 1323.

The reliance of the City and AASBC-PAC on cases striking down *governmentally-imposed* barriers to participation in the electoral process in support of their argument that economic inequalities are unconstitutional is in obvious defiance of the Supreme Court's rejection of this very argument based upon the very cases relied upon by the parties.

> [T]he principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression. Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.

Id. at 49 n.55.

Again, even if we were to consider the facts in this case relating to alleged economic and racial disparity, the record does not bear out the parties' arguments. In its attempt to show that a meaningful campaign for city council can be run on $140,000 or less, the City factually undercuts its argument that candidates without access to wealth are excluded from the process and that voters are deprived of hearing from these very candidates. Four current councilmembers won by spending less than $140,000. Incumbent Tyrone Yates spent only $33,000 on a successful campaign and successful challenger Minette J. Cooper spent $97,000. These candidates relied upon direct voter contact and participation in candidate forums for communicating their political message to the electorate. The argument of intervenor-defendant AASBC-PAC is more puzzling. It argues that African American voters and candidates suffer a distortional effect as campaign

expenditures rise; their representation diminishes. AASBC-PAC Br. at 13. Race enters the calculus because the African American community "has less disposable income available to spend on a campaign." *Id.* at 16. However, African Americans hold 4 of the 9 council seats, which equates with its 40% representation in the City as a whole. Further, 2 successful African American candidates were among the top fundraisers in the 1995 election. The record fails to support the assertion that candidates without wealth and African Americans are excluded from meaningfully participating in Cincinnati city council elections.

4. Spending Limits Cannot Be Justified As A Reasonable Regulation of the Manner of Speech

As an alternative argument, the City contends that the Ordinance is justified as a reasonable regulation on the manner of speech in the election process of the sort recognized in *Kovacs v. Cooper,* 336 U.S. 77 (1949). The City makes this argument despite recognizing it was explicitly rejected in *Buckley:*

> Nor can the Act's contribution and expenditure limitations be sustained . . . by reference to the constitutional principles reflected in such decisions as . . . *Kovacs v. Cooper.* . . . The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to

> any reasonable time, place, and manner regulations otherwise imposed.

Buckley, 424 U.S. at 18 (internal citations omitted). The City cannot avoid binding precedent by merely criticizing it as "irrational."

III. CONCLUSION

The parties supporting the Ordinance have failed to advance any governmental interest outside of those interests considered and rejected as constitutionally insufficient by the *Buckley* court. Their arguments and Cincinnati's motivation for enacting this campaign spending limit have not gone unnoticed by dissenting members of the Supreme Court:

> Finally, I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. As Justice White pointed out in his opinion in *Buckley*, "money is not always equivalent to or used for speech, even in the context of political campaigns." 424 U.S. at 263 . . . (opinion concurring in part and dissenting in part). It is quite wrong to assume that the net effect of limits on contributions and expenditures – which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fundraising, and to diminish the importance of repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment. See *id.*, at 262-266.

Colo. Republican, 116 S. Ct. at 2332 (Stevens, J., dissenting). These views, however, have been rejected by a

majority of the Court. As this case is controlled by *Buckley* and its progeny, the decision of the District Court is AFFIRMED.

CONCURRING

COHN, District Judge, concurring.

I write separately to add these few words. It should be recognized that *Buckley v. Valeo*, 424 U.S. 1 (1976), was decided on a slender factual record. Similarly, although the City here attempted to develop a compelling factual record, it failed to do so.

Additionally, although the majority accurately states that "[t]he need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns," *supra* at 20, I believe the statement that "because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending," *id.*, goes too far given the factual record. There is an independent interest in freeing officeholders from the pressures of fundraising so they can perform their duties.[1] This interest is not encompassed by the prohibition on limiting the costs of campaigns. *Cf. Rosenstiel v.*

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[1] The Brennan Center notes that "[o]ne former Member of Congress estimated that during a campaign he and his staff spent 80% of their time fundraising." Brennan Center Br. at 11 (citing Jamin Raskin and John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 Colum. L.Rev. 1160, 1188 (1994)). Further, "[o]ne

Rodriguez, 101 F.3d 1544, 1553 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997) (noting that with regard to a system of public campaign financing, "the State seeks to promote . . . a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning. It is well settled that [this] governmental interest [is] compelling.") (citing *Republican Nat'l Comm. v. Federal Election Comm'n*, 487 F. Supp. 280, 285 (S.D.N.Y.) (three-judge court), *aff'd mem.* 445 U.S. 955 (1980)); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (stating that when "the legislature has adopted a public funding alternative, the state possesses a valid interest in having candidates accept public financing because such programs . . . free candidates from the pressures of fundraising") (citing *Buckley*, 424 U.S. at 91). A determination of whether this interest is sufficiently compelling to justify campaign expenditure limits should be left for another day.

Similarly, it does not necessarily follow from the Supreme Court's rejection of the interest in limiting the high costs of campaigns that the interest in preserving faith in democracy is per se insufficient to justify the expenditure limits. Given the sparsity of the record, including the fact that the statistics advanced by the City

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political consultant has reported that even [President Clinton] has complained 'bitterly' at having to spend so much time fundraising, saying: 'I can't think. I can't act. I can't do anything but go to fundraisers and shake hands. You want me to issue executive orders; I can't focus on a thing but the next fundraiser.' " *Id.* at 12 (quoting Dick Morris, *Behind the Oval Office: Winning the Presidency in the Nineties* 150, 151 (1997)).

regarding public cynicism were compiled prior to the time the contribution limits and disclosure requirements of City Ordinance No. 336-1995[2] could have any real effect, we should refrain from commenting on whether the interest in preserving the faith of the citizens in our democracy is a mere outgrowth of the interest in limiting the high costs of campaigns.[3]

In sum, this is not the case to change the landscape of campaign finance. Put succinctly, the City lost because it failed to develop a compelling factual record and because it asserted the same arguments that were in no uncertain terms rejected by the Supreme Court in *Buckley*. The Supreme Court's decision in *Buckley*, however, is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign

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[2] In 1997 minor amendments were made to City Ordinance No. 336-1995. *See* City Ordinance No. 9-1997.

[3] The City's ordinance limiting contributions and requiring disclosure was enacted in November 1995, the same year the expenditure limit was enacted. The statistical data advanced by the City regarding the size of contributions and the potential for undue influence were compiled for the 1995 campaign. The public opinion research polls conducted on behalf of the City were undertaken in July 1996 and completed in December 1996. The contribution limits, therefore, did not affect fundraising during the 1995 city council campaign, and presumably did not significantly influence public opinion by December 1996.

expenditure limits are a narrowly tailored means of serving such an interest.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN R. KRUSE, et al.,

Plaintiffs

v. C-1-96-252

THE CITY OF CINCINNATI, et al.,

Defendants

ORDER

This matter is before the Court upon Plaintiffs' motion for summary judgment (Docs. 16; 22), Defendants' memorandum in opposition thereto (Doc. 38), and Plaintiffs' reply (Doc. 39), as well as an opposing memorandum filed on behalf of certain intervening parties. (Doc. 37).

In addition, Plaintiffs' motion to compel responses to certain discovery requests (Doc. 41) is pending before the Court. Defendants have opposed that motion as well. (Doc. 42).

At a hearing held in open court on January 31, 1997, counsel for Plaintiffs orally withdrew that portion of Plaintiffs' prayer for relief seeking a declaration of the unconstitutionality of, and thus enjoining enforcement of, limitations on Cincinnati City Council campaign contributions.[1] (*See* Amended Complaint, Doc. 3, pp. 13-14,

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[1] Plaintiffs' counsel orally represented on the record at the hearing that the inclusion of a reference to campaign **contributions**, as opposed to campaign **expenditures**, had been "inadvertent."

¶¶ B & C). Conceding that they were unprepared at that time to present evidence in support of Plaintiffs' additional request for compensatory damages (*see* Doc. 3, pp. 14, ¶ E), Plaintiffs' counsel orally consented to postponing a decision on that portion of Plaintiffs' prayer for relief as well. Counsel for all original parties and for intervening parties of record then were permitted to present arguments as to the remaining issues raised by Plaintiffs' amended complaint and motion for summary judgment. (*See* Docs. 3, 16).

At the conclusion of such hearing, the Court issued a oral decision on Plaintiffs' motion for summary judgment. This written order memorializes that decision for purposes of the docket.

IT THEREFORE IS ORDERED that Plaintiffs' request for a declaratory judgment and for injunctive relief with respect to limitations on Cincinnati City Council campaign contributions (Doc. 3, pp. 13-14, ¶¶ B & C) hereby is DISMISSED, having been voluntarily withdrawn by Plaintiffs. IT ALSO IS ORDERED that Plaintiffs' request for compensatory damages (Doc. 3, p. 14, ¶ E) hereby is administratively TERMINATED upon the docket of this Court, without prejudice to Plaintiffs' right to resubmission.

IT FURTHER IS ORDERED that Plaintiffs' motion for summary judgment (Doc. 16) hereby is GRANTED, in reliance upon *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976), as to all remaining claims contained in Plaintiffs' prayer for relief. (Doc. 3, pp. 13-15). Accordingly, the

Clerk of this Court hereby is DIRECTED to enter a declaratory judgment in favor of Plaintiffs and against Defendants, declaring Cincinnati City Ordinance No. 240-1995 § 115-3 to be unconstitutional on its face; to enter an order permanently enjoining enforcement of that provision of such ordinance, and to enter an order in favor of Plaintiffs for their attorney's fees, interest and costs incurred in conjunction with this matter, in an amount yet to be determined. Accordingly, Plaintiffs' motion to compel discovery (Doc. 41) hereby is DENIED, both as moot and on its merits.

Pursuant to Fed. R. Civ. P. 54(b), the Court further CERTIFIES that there is no just reason for delay, and that final judgment shall be entered hereon forthwith.

IT IS SO ORDERED.

/s/ Herman J. Weber
Herman J. Weber, Judge
United States District Court

[p. 1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN R. KRUSE, et al.,	CIVIL ACTION NO. C-1-96-252
Plaintiffs,	Cincinnati, Ohio
- v-	Friday, January 31, 1997
THE CITY OF CINCINNATI, et al.,	9:00 a.m. Hearing
Defendants.	**Motion for Summary Judgment**

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE HERMAN J. WEBER, JUDGE

TRANSCRIPT ORDERED: John C. Bonifaz, Esq.

APPEARANCES:

For the Plaintiffs: FINNEY, BACON & STAGNARO CO., LPA
BY: Christopher P. Finney, Esq
and David R. Langdon, Esq.
2623 Erie Avenue
P.O. Box 8804
Cincinnati, Ohio 45208

For Deft. City: Mark S. Yurick, Esq.
Senior Assistant City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202

John C. Bonifaz, Esq.
Abigail Turner, Esq.
National Voting Rights Institute
401 Commonwealth Avenue,
Third Floor
Boston, Massachusetts 02215

For Intervenor-Defts. African-American Small Business Committee, PAC, and Barbara Milon: COHEN, TODD, KITE & STANFORD
BY: Eric H. Kearney, Esq.
[p. 2] 525 Vine Street
16th Floor
Cincinnati, Ohio 45202

For Intervenor-Defts. Charter Committee, Hamilton County Democratic Party and Matthew Rosen: BENESCH, FRIEDLANDER, COPLAN & ARONOFF
BY: Donald J. Mooney, Jr., esq.
2800 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202

Also Present: Mrs. Bobbie Sterne
Todd Portune, Esq.
Michael D. Eagen, Esq. with the Ukraine Delegation, and
Other interested persons

Law Clerk: Susan Ferrell, Esq.

Courtroom Clerk: Elizabeth Brockmeier

Court Reporter: Mary Ann Ranz

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* * *

[p. 51] THE COURT: The Court wants to comment somewhat on the facts and on the matter. I don't

expect anyone to agree [p. 52] with anything the Court says. Certainly *some of you will* agree with some of the things, and some of you will not agree, and some of you will dispute things the Court says very legitimately and vociferously.

The first point that I want to make is that – the issue of whether the *Buckley* court had a factual finding before it, and I depend upon the opinion of the United States Supreme Court in this regard and I'm quoting from Page 10 of 424 U.S. – or I'm actually reading from the Supreme Court Reports, 96, Supreme Court Report at Page 630 and I'm quoting:

> "On remand, the District Judge entered a memorandum order adopting extensive findings of fact and transmitting the augmented record back to the Court of Appeals."

Now, under the instructions of the Federal Rules of Civil Procedure – and I don't know that we very often refer to this rule, but to me it may be the most important rule of the lot, and I'm reading Rule 1:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy and inexpensive determination of every action."

[p. 53] This Court has dedicated itself, at least in this case, to attempt to follow that mandate of the rules to secure the parties the just, the speedy, and the inexpensive determination of the issues that are to be presented.

The parties have cooperated, and at the request of the Court the defendants have, at least it's my understanding, presented to the Court what they believe to be the facts and justifications for the ordinance, and the Court accepts those facts and statements as true. These facts and statements will be true throughout the course of the appeals in this case, and the Court believes that the defendants have been able to present these facts in a complete manner.

The Court determines that they're not, for the purposes of this hearing, disputed facts. The facts are all stipulated. Therefore, this Court has the duty of determining and interpreting those facts and applying the law as it exists.

Now, I've already alluded to one concern, and that is that – and that's Finding of Fact 1 where 18 candidates spent $2.33 million. This means that the average cost of campaigns – and I agree that one candidate paid 33,000 and one candidate paid two hundred and forty-some thousand and didn't receive election – but the average cost was a hundred and twenty-nine thousand four hundred and forty-four dollars and forty-four cents. That if we have more candidates [p. 54] running, say we had 18 in 1995 – say we have 20, then the cost of the election will be $2,800,000, if they all spend a hundred and forty thousand dollars as suggested.

The Court would find, therefore, that the hundred and forty thousand dollar limit should be more than reasonable for any Council election here in the City of Cincinnati. In fact, the Court believes that it is extremely high, but that's the Court personal opinion and it cannot

impose its personal opinion on the legislative body of the city or of the people of Cincinnati. The Court's personal opinion is absolutely irrelevant.

The Court accepts as true the Statements of Fact Number 34 to 37, and concludes that the people believe that what the Court would say "excessive contributions" made by certain individuals and corporations, or whoever here in Cincinnati, that money does corrupt the judgment of those that are recipients or benefactors of that money.

In Findings of Facts 15 through 29, the Court accepts that the contributions and – the people perceive that the contributions are corrupting the legislative process. In fact, specifically a Council person, who I hold in deep respect, specifically said, and this was in Finding of Fact 28, that large contributions expect a *quid pro quo*.

24 – well, that's – that's a different subject.

So, the Court believes without hesitation that these [p. 55] unusual contributions for a City Council election are detrimental to the election process.

However, in a well-reasoned opinion that this Court cannot take issue with, even if it disagreed with it, in the *Buckley* decision, the Supreme Court thought the problem through in a different context, albeit. But, advice given to us who labor here in the hinterlands is good advice, and that advice is that these evils must be addressed by limiting contributions and by having enforceable and reasonable and good reporting and disclosure requirements. This is a sensible and a perfectly constitutional approach to solving the problems that the City has

expressed in their Statements of Facts. Certainly, the facts stated in 1 through 11 can be addressed in this manner and should be addressed in this manner. This Court, through its personal experience – which again is not relevant, but we're all products of our environment and our past experiences – has had the opportunity to personally run in several elections, albeit they were of a judicial nature. But the pertinence of them is there were severe limitations, or at least apparently so, on the contributions that could be made. And the parties have cited cases, particularly the one out of the Northern District of Ohio, and the City Council relied on the Supreme Court's – or Ohio's approach to limiting contributions. And to me, the limiting of contributions forced a candidate to be [p. 56] more responsive and be a wider person in the sense of his experience – his or her experience – as they had to go to more and more and more participants in the political process to gain their contributions.

The unlimited spending may be an evil. The interesting point, there was an election, I believe, in Massachusetts where the two participants – and I do not remember it as I sit here whether it was for Senator, but it was, for an important elective office in Massachusetts, I believe, at least in the New England area, where the candidates themselves agreed and limited their spending voluntarily. Certainly, those who are interested in preserving the essence of our democracy would seem to be well-motivated enough to "voluntarily" eliminate – or limit their spending. This, of course, has not happened here in Cincinnati.

It seems incredible that the concern – the problem is, Cincinnati has been blessed by the energy and enterprise

of its people to accumulate great wealth. It's a most fortunate city and area from that respect. It has a rich and important and sometimes checkered political history, if you go back far enough – and this Court did in the *Clark versus the City of Cincinnati* case where it had to analyze the reasons for the emergence of the city manager form of government.

But, the evil, if there is an evil that wealth creates, can be constitutionally controlled by the limiting on [p. 57] contributions. Certainly, it seems like a terrible oppression on a person who may have personal wealth, who wishes to use that wealth advocating that person's own candidacy, to exclude such person from advocating his candidacy. And in this last Presidential, at least in the primary and in the general election, we have witnessed where individuals of wealth have been able to at least impact somewhat the election process.

The citations to the *Buckley* case have been reiterated into the record. The Court recognized that the limit – that the limitation on expenditures implicate fundamental First Amendment interests and that the expenditure ceiling imposes significantly more severe restrictions on protected freedoms of political expression and association than do its limits on financial contributions, and that is at page 23 of the Opinion.

In this case, it is clear that the City of Cincinnati, Ohio is challenging the United States Supreme Court's decision in *Buckley versus Valeo*. This is quite apparent. It's in Statement of Fact 24. It is in Mr. Portune's affidavit at Page 4, Exhibit 6, and there are other – other examples of them, but it specifically indicates that the City was

well aware of and felt the necessity of challenging the *Buckley – Buckley* ruling.

The City deserves some praise, in the Court's opinion, [p. 58] for basing this approach on what it considers to be new facts of its own in taking the lead in revisiting the Supreme Court's decision in *Buckley*. It is apparent that there is a dissatisfaction with the *Buckley* decision, as indicated in the holdings that have been accepted as facts in this case. But there again, the corruption and the impact or appearance of corruption can be best addressed under limiting contributions, strictly enforcing the contribution limit by enforcing any criminal laws that are designed to deter corruption and by reporting and disclosure requirements.

The Court notes that the ordinance specifically states that it is imposing a civil penalty rather than a criminal penalty. Counsel hasn't argued that, but it's what the ordinance says.

So, the fact it is imposing a civil penalty does have some significance, and the Court does count that as a – one of the distinguishing characteristics. But the penalty is still a penalty; it still deters and impacts free speech.

The civil penalty, by the way, I believe is six times the over – the over-expenditures, ten times – I'm sorry – ten times the amount of expenditures, so that the chilling effect is, indeed, very substantial.

The issue that this Court has been instructed to apply, or the rule of law that this Court is instructed to follow is that the constitutionality of this ordinance turns on whether [p. 59] the governmental interest advanced in

its support satisfies the exacting scrutiny applicable to limitations on core first amendment rights of political expression. *Buckley* at 44 and 45.

Considering that, the *Buckley* court stated:

> "The governmental interest in preventing corruption and the appearance of corruption is inadequate to justify ceilings on independent expenditures."

This is at 45.

Buckley court goes on:

> "The governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections."

It goes on to explain that . . .

> "The First Amendment protection cannot properly be made to depend on a person's financial ability to engage in public discussions." That's at page 49.

And then it simply says, "Limitations on expenditures is unconstitutional." Page 50.

> "The candidate, no less than any other person, has a First Amendment right to engage in the discussion. It is of particular importance that candidates have the unfettered opportunity to make their views known."

> "The ancillary interest in equalizing the relative financial resources of candidates competing for elective [p. 60] office provides the sole relevant rationale for expenditure ceiling." That's at 54.

The instruction of the Court is . . .

> "The First Amendment simply cannot tolerate restrictions upon the freedom of the candidate to speak without legislative limit on behalf of his own candidacy. Restrictions on a candidate's personal expenditures is unconstitutional;" 54.

The justifications of the arguments for the City have been alluded to as the six justifications: Preventing appearance of corruption; preventing actual corruption; equalizing the ability of all citizens to participate in elections and affect the choices available to them; opening the process to candidates less able to meet the prohibitive costs of election campaigns. Then the ones that the City maintains are new ones: Protecting the Equal Protection rights of all citizens – Cincinnati voters to participate on an equal and meaningful basis; protecting the First Amendment rights of all voters to be heard and to hear the information from all candidates.

The Court finds that these six positions, and particularly the two conditions that have been alleged as new, are simply a restatement of the first four that have already been decided in *Buckley* and that, therefore, they add no new reasons or materials for this Court to distinguish the [p. 61] case before it from the *Buckley* decision.

The City further argues it is only a reason – that the restriction is only a reasonable time, manner and place regulation. Those regulations may be upheld in certain circumstances. Certainly those cases have been argued in this court. They usually come before this Court around Christmastime.

(Laughter.)

THE COURT: But the *Buckley* court specifically rejected that as a premise and specifically distinguished the problem at hand from the *Kovacs versus Cooper* problem.

The fact that a candidate may have a great net worth or no net worth is a fact over which government has no control, that some of us have been favored in life, some of us have not been favored in life, all of us are equal and entitled to run for City Council, if we are so disposed to do so, without regard to our net worth.

The leveling of the playing field, if that be a desire, can constitutionally be done, if at all, by limiting the contributions to candidates.

The corruption and appearance of corruption – the appearance of corruption can be eliminated by the contribution limitations. The actual corruption can be eliminated by the criminal law and certainly by the electorate.

[p. 62] In all this, one must reflect upon what is the basic purpose of our First Amendment; what does it mean to each of us? It has been expanded and used – and some will say misused – on many occasions. This Court has heard cases where those arguments, pro and con, have been made. But to me, if the First Amendment means nothing else, it means that each of us has a right to express our political views freely and without limitations; that each of us has a right to practice our religion without interference from government; and that the press has the right to be free, independent and journalistic in watching

over the governmental process, and particularly the democratic process.

It would seem to this Court that the oversight of the press would guarantee that actual corruption will not occur here in the City of Cincinnati; that the oversight of the other council members will see that actual corruption does not appear here in Cincinnati. And if they fail, then the criminal justice system will see that corruption does not occur in the City Council of Cincinnati.

The Court disagrees with the City's position that *Buckley* created an irrational distinction when it rejected the *Kovacs* analysis.

The Court disagrees with the City's position that there are disputed facts in this case. The Court, in its investigation finds that the only courts that have spoken on [p. 63] the matter, that the courts have been very reluctant to limit expenditures of candidates and have only done so in a very unique and specific way. And in that case there was a corporation that limited the expenditures of a corporation, not an individual, and in the same case pointed out that the limitations of spending of a candidate would be considered improper.

In sum, the Court would find that accepting the Statement of Facts as true, that the evils expressed therein and the societal interests and the interests of the City of Cincinnati in limiting expenditures of candidates must be – cannot be distinguished from that of the *Buckley* situation, and that this Court is bound by its own judgment and by the theory of *stare decisis*, after considering the arguments of counsel, that the limits are unconstitutional.

The Court further finds that contribution limitations can effectively address each one of the issues that have been advanced as a societal interest and the legislative interest, and that the City has the obligation, if it so chooses, to refine and proceed to construct a constitutional ordinance limiting contributions.

The Court acknowledges that we, the City of Cincinnati, has been given the powers of Home Rule under Article 18 of the Ohio Constitution and has the right to regulate and control its own elections, as long as it does not infringe on [p. 64] acknowledged First Amendment rights of certain individuals.

The Court acknowledges that it is the will of the majority of the people of Cincinnati to impose spending limits on campaigns. The First Amendment was specifically designed to protect the First Amendment rights of political candidates, religious participants, the news media from the will of the majority if it would be the purpose of the majority to deny certain constitutional rights.

The Court acknowledges that the restrictions on the ballot access is to be decided, and this Court carefully examined that issue from the point of view of the City of Cincinnati in *Clark versus Cincinnati,* and it was determined that there was no restriction on access to running for Council imposed by the City on the availability or access to become a candidate. The fact that this is a field race rather than a one- or two- or three-party race is not persuasive to the Court.

In sum, again in sum, the Court will conclude and declare that Section 115-3, the expenditure limits contained in Ordinance number 240-1995 violates the Constitution of the United States and the First Amendment rights of candidates; that, therefore, the preliminary injunction issued in this case is made permanent; that this Court will administratively terminate the request for compensatory damages, and to be reinstated, if appropriate, upon reprimand from any appellate [p. 65] court. The Court will handle the other matters according to the law.

So that there can be no question about the intent of the Court, this Court, at this time, I will hear arguments as to whether there's any just cause to delay entry of final judgment and certifying this decision of the Court under Rule 54(b) to the Court of Appeals. I don't know of any.

* * *

97-3193/3194/3210

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN R. KRUSE, ET AL., Plaintiffs-Appellees, v. CITY OF CINCINNATI, ET AL., Defendants-Appellants (97-3194), CHARTER COMMITTEE OF GREATER CINCINNATI, ET AL., Intervenor-Defendants-Appellants (97-3193), AFRICAN-AMERICAN SMALL BUSINESS COMMITTEE, PAC, ET AL., Intervenor-Defendants-Appellants (97-3210).	ORDER (Filed June 18, 1998)

BEFORE: KENNEDY and SILER, Circuit Judges; and COHN,* District Judge

The court having received three petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing

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* Hon. Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

EMERGENCY

City of Cincinnati

An Ordinance No. 240

N.H.S.

-1995

AMENDING Title I of the Cincinnati Municipal Code by ordaining supplementary Chapter 115. Campaign Finance, to provide expenditure limits for campaigns for City Council.

WHEREAS, on May 3, 1994, the electors of the city of Cincinnati approved an amendment to the Charter of the city of Cincinnati which permits the City Council to pass legislation which differs from state law in the area of campaign financing, campaign contributions and campaign expenditures; and

WHEREAS, it is the sense of Council that limitations on campaign expenditures are the most effective means of promoting meaningful campaign reform; now, therefore,

BE IT ORDAINED by the Council of the city of Cincinnati, state of Ohio:

Section 1. That Chapter 115 of Title I of the Cincinnati Municipal Code is hereby ordained to read as follows:

CHAPTER 115

CAMPAIGN FINANCE

Section 115-1. Definitions.

For the purposes of this chapter the words and phrases defined herein shall have the meanings ascribed to them in Title 35. Elections, of the Ohio Revised Code or, unless another meaning is ascribed to them in this chapter. Provisions of the Ohio Revised Code otherwise applicable to the provisions of this chapter which have been altered by the provisions of Amended Substitute Senate Bill 8, signed by the Governor of the State of Ohio on May 24, 1995 shall be incorporated herein upon the effective date of this ordinance, whether or not the provisions of that bill have taken effect.

Section 115-1-E. Election Cycle.

"Election cycle" shall mean that two year period commencing on December 1 next following a regular municipal election held on the first Tuesday after the first Monday in November and extending through November 30 next following a [sic] the next subsequent regular municipal election.

Section 115-1-E1. Expenditure.

"Expenditure" means the disbursement or use of either a contribution or personal funds of a candidate for the council or his or her immediate family on behalf of or for the benefit of the candidate for the purpose of advocating his or her election to the council or the defeat of his or her opponent. "Expenditure" does not include an independent expenditure, uncompensated

volunteer services, or slate cards, sample ballots, or other publications of a political party that identify all of the candidates endorsed by the party in an election.

Section 115-1-I. Immediate Family.

"Immediate family" shall mean the candidate, the candidate's spouse, parents, children, sons-in-law, daughters-in-law, brothers, sisters, grandparents, mother-in-law, father-in-law, brothers-in-law, sisters-in-law, or grandparents by marriage.

Sec. 115-3. Expenditure Limits.

The total amount of expenditures made in the election cycle by a candidate or the campaign committee of a candidate for the council shall not exceed three times the annual compensation provided for the office to which a candidate seeks election.

Sec. 115-5. Reporting requirements.

All reports filed by any candidate for the council with the election authorities of the State or the Hamilton County Board of Elections shall also be filed with the Clerk of Council and the Office of Contract compliance and investigations.

Sec. 115-7. Rules; Investigations.

The director of the office of contract compliance and investigations shall adopt rules necessary for the administration and enforcement of the provisions of this chapter.

The director of the office of contract compliance and investigations shall review all reports filed with the clerk of council under the provisions of

this chapter for compliance with this chapter and shall investigate any matters which vilolate any of the provisions of this chapter.

Upon presentation to the director of the office of contract compliance and investigations of a sworn affidavit of any person, made on personal knowledge, setting forth any violation of the provisions of this chapter the director shall proceed to investigate the charges made in the affidavit.

If the director of the office of contract compliance and investigations finds a violation the director shall impose a civil fine in accordance with the schedule of fines contained in this chapter, the imposition of which shall be subject to appeal under the provisions of Section 119.12 O.R.C. Any fines collected under the provisions of this chapter shall be deposited in the General Fund of the city of Cincinnati.

If the director of the office of contract compliance and investigations finds, after investigation of an allegation of failure to comply, that a violation has not occurred the director shall prepare a report of those findings which shall be kept on file in the office of contract compliance and investigations for a period of one year.

Sec. 115-99. Penalties.

The candidate of any campaign committee that expends funds in violation of the provisions of this chapter shall be fined an amount equal to ten (10) times the amount of excess expenditures over permitted expenditures.

Failure to file any report required under the provisions of Section 115-5 hereof shall be cause

for the imposition of a fine of $200.00 dollars per day per report for each day of violation.

Section 2. The provisions of the laws of the state of Ohio pertaining to campaign financing, campaign contributions and campaign expenditures that are not inconsistent with the provisions of this chapter shall remain in full force and effect and shall apply in addition to the requirements of this chapter. In the event of a conflict between the provisions of the laws of the state of Ohio and the provisions of this chapter, the provisions of this chapter shall control.

Section 3. This ordinance shall be in force and take effect from and after the earliest period allowed by law.

Passed July 6 A.D., 1995

/s/ Roxanne Qualls
Mayor

Attest /s/ Sandy L. Sherman
Clerk

I HEREBY CERTIFY THAT ORDINANCE NO. 240 1995 WAS PUBLISHED IN THE CITY BULLETIN IN ACCORDANCE WITH THE CHARTER ON 7-18-59.

/s/ Sandy L. Sherman
Clerk of Council

No. 98-454

Supreme Court, U.S.
FILED
OCT 15 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

CITY OF CINCINNATI; ROXANNE QUALLS, Councilmember and Mayor of the City of Cincinnati; DWIGHT TILLERY, Councilmember; TYRONE YATES, Councilmember; TODD PORTUNE, Councilmember; BOBBIE STERNE, Councilmember; PHILIP M. HEIMLICH, Councilmember; MINETTE J. COOPER, Councilmember; THOMAS A. LUKEN, Councilmember; NICHOLAS J. VEHR, Councilmember; CHARLES WINBURN, Councilmember; JOHN F. SHIREY, City Manager of the City of Cincinnati,

Petitioners,

v.

JOHN R. KRUSE; KRUSE FOR COUNCIL COMMITTEE; THOMAS E. BRINKMAN, JR.; MARK W. MILLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER P. FINNEY
DAVID R. LANGDON
FINNEY, BACON & STAGNARO, CO., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208
(513) 533-2996

MICHAEL A. CARVIN*
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
2000 K Street, N.W., Suite 401
Washington, D.C. 20006
(202) 822-8950

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case includes "facts" not properly considered by this Court, either because they were not included in the record or because they are irrelevant to this Court's analysis. It further excludes facts in the record important to this Court's analysis.

Cincinnati Ordinance 240-1995 (the "Ordinance"), enacted on July 6, 1995, prevented any candidate for the City Council from spending in excess of approximately $140,000 in an election, in contravention of respondents' First and Fourteenth Amendment rights.[1] It is this Ordinance that is challenged in this case. Also for the first time in the 1997 elections, the Cincinnati City Council imposed a $1,000 limit on campaign contributions to candidates for city council. City of Cincinnati Ordinance No. 336-1995.[2] This was enacted on October 11, 1995, three months after the expenditure limit ordinance.

Respondents filed suit challenging the Ordinance as facially unconstitutional and later filed a motion for summary judgment on their claims. As part of their opposition to the respondents' motion for summary judgment, petitioners used this unimpeded opportunity to present all facts they intended to present at trial, loading the

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[1] *Buckley v. Valeo*, 424 U.S. 1 (1976). The Cincinnati City Solicitor informed the Council prior to the vote on the Ordinance of the constitutional prohibition on campaign spending limits: "As we have previously advised the Council and the Campaign Finance Advisory Board, the U.S. Supreme Court has found expenditure limits to be unconstitutional in the case of *Buckley v. Valeo.*" Joint Appendix I (before the court of appeals) ("Jt. App.") at 35.

[2] *See* Respondents' Appendix ("RA") at 1-10. The 1995 contributions limit ordinance was subsequently repealed, but a new ordinance was enacted which included the same $1,000 limit on individual contributions. City of Cincinnati Ordinance No. 9-1997. *See* RA at 11-26.

record with factual allegations they claim justified the Ordinance.[3] Virtually none of the "facts" presented motivated the Council when it passed the Ordinance; some were not even available to the Council at the time of the passage.[4]

The City claims "that it seeks only the opportunity to prove at trial that its campaign spending limits are necessary to address its compelling governmental interests." Pet. at 8-9.[5] However, the City had ample opportunity to produce for the district court in its opposition to the respondents' motion for summary judgment all evidence that it thought it could prove at trial. Petitioners effectively admit the deficiencies in the record before this Court by asking for this Court to permit them to return to the district court to introduce yet more evidence at trial.

REASONS FOR DENYING THE WRIT

The petition entirely fails to identify any grounds warranting the Court's plenary review under traditional,

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[3] One fact petitioners emphasize is that the Ordinance arose out of "twenty months of study and deliberation." Pet. at 2. Yet they fail to note that the Campaign Finance Advisory Board appointed by the Council to study the campaign finance issue recommended against the spending limitations imposed by the Ordinance. Jt. App. I at 148-49.

[4] For example, following the commencement of this litigation, the City commissioned two studies, one purporting to analyze spending patterns in City Council elections, summarized in Jt. App. I at 81-103, and another being a public opinion research project conducted over the six-month period from July through December 1996, summarized in Jt. App. I at 104-23.

[5] References to the petition for a writ of certiorari filed will be noted as "Pet." References to petitioners' appendix will be referred to as "App." The full record of the district court will be referred to as "R."

recognized criteria. First, petitioners point to no conflict among lower federal courts concerning the constitutionality of expenditure limits for candidates. Rather, any similar contention has been uniformly and unanimously rejected by every court to hear it.[6]

Moreover, while petitioners make the general assertion that the lower court misconstrued this Court's seminal decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), they do not directly dispute that the court below correctly interpreted and applied the legal principles articulated in that case. Specifically, petitioners do not dispute that the court below was correct to review the Cincinnati Ordinance under strict scrutiny principles or that this Court struck down an indistinguishable expenditure limit enacted by Congress as facially unconstitutional pursuant to that test.

Rather, petitioners argue only that "new facts and circumstances" demonstrate that expenditure limitations in Cincinnati are, in fact, narrowly tailored to compelling government interests primarily because, without them, the electoral system in Cincinnati "appears" to be "corrupt." Pet. at 13. As the court below correctly recognized, however, petitioners' position is fundamentally flawed for two independent reasons. *Buckley*'s invalidation of electoral limits was not dependent on any specific record evidence and, in any event, Cincinnati has utterly failed to allege any new evidence, not considered by *Buckley*, in

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[6] *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (Ohio law limiting campaign expenditures for judicial candidates unconstitutional); *NAACP v. Jones*, 131 F.3d 1317, 1323 (9th Cir. 1997), *cert. denied*, 1998 U.S. LEXIS 4807 (U.S. Oct. 5, 1998) ("The 'wealth primary' does not burden any fundamental First Amendment rights."); *Shrink Missouri Gov't PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996) (Missouri law limiting campaign expenditures for candidates unconstitutional).

support of its Ordinance. The *Buckley* decision did hold, as a matter of law, that spending limits were not justified by the government's interest in reducing the appearance of corruption caused by large donors potentially exercising improper influence over candidates. Rather, as *Buckley* and its progeny repeatedly make clear, the problem of large donors exercising disproportionate influence is directly addressed by outlawing such donations; while reducing the amount a candidate can spend of his own money or small donations is obviously, at best, a "fatally overbroad" and unnecessary response to this concern. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) ("NCPAC").

In addition, even in the wholly implausible event that *Buckley* struck down Congress' expenditure limits as facially unconstitutional only on a conditional basis, to be revived when presented with "new facts" establishing a better link between spending caps and reducing large donor influence, this record is wholly devoid of any such evidence, as the court below carefully explained. There is not a scintilla of evidence that any candidate in federal *or* Cincinnati elections has violated any contribution limitation or that spending caps will somehow reduce large donor influence or otherwise render contribution limits more "effective." As the court below noted, there could not possibly be any such evidence on this record since Cincinnati never had contribution limits until after they had enacted spending caps and thus had no experience to determine whether contribution limits alone were "adequate." App. at 20.

The "new evidence" trumpeted by petitioners, then, consists of news clippings and law review articles maintaining that the "limited" *scope* of federal laws governing contributions renders them inadequate to eliminate large donor influence because of "bundling" and "soft money" "loopholes." Pet. at 18, 20 n.27. But even assuming such "loopholes" somehow do diminish the "effectiveness" of

contribution limits, this is not relevant to the *Buckley* court's straightforward conclusion that expenditure limits cannot *bolster* the effectiveness of whatever contribution limits may be in place. In other words, if petitioners are correct that "bundling" and other federal "loopholes" are unwarranted, the only appropriate response is to close those loopholes to the extent, if any, such restrictions are constitutionally permissible. It provides no basis, however, to prohibit all candidates from *spending* money, including money which has not been obtained through bundling or other loopholes. Any attempt to "cure" the problem of large donor influence by prohibiting the expenditure of money not derived from large donors is therefore fundamentally misguided and necessarily overbroad.

Petitioners attempt to avoid this binding precedent and irrefutable logic by redefining political "corruption" (or the appearance thereof) from the "improper influence" of large donors upon candidates – which *Buckley* said government could legitimately target – to include general public cynicism about politicians or politics. The latter phenomenon, according to the City, is fueled by the advantages provided by money in electoral politics. Upon this premise, petitioners make the tautological argument that efforts to eliminate the advantages of well-funded candidates reduces the "appearance of corruption" because the advantages of well-funded candidates in elections "appear," to the general public, to be "corrupt."

But if *Buckley* stands for anything, it is that money spent *by* candidates is not a corruption of the electoral process; it is core political speech essential to the electoral process. Thus, it matters not whether the average person thinks it is "unfair" or "corrupt" that one candidate may more effectively communicate his message to voters because he has more money with which to do so. Such communication is core political speech and its constitutional protection is not determined by public opinion

polls. In any event, as the concurring opinion specifically noted, the City is unable to produce any evidence that the Cincinnati electorate viewed unlimited campaign spending as "corrupting" if it was combined with contribution limits, since the polling that the City relied upon was done before any contribution limits had taken effect in any election cycle. App. at 30-31 (Cohn, J., concurring).

Thus, the court below is entirely correct that the interests advanced in support of the Cincinnati Ordinance are both illegitimate as a matter of law and, in any event, supported only by factual allegations and legislative findings indistinguishable from those relied upon by Congress and rejected by the *Buckley* court. Accordingly, unless the core legal holdings of *Buckley* are to be reversed, the Cincinnati Ordinance is plainly unconstitutional. Petitioners, however, have not asked the Court to so modify *Buckley* and any such revision would be precluded by every fundamental principle of *stare decisis*. Moreover, since petitioners have not and cannot allege new facts and circumstances which either distinguish *Buckley* in a Cincinnati-specific context or demonstrate that the allegedly empirical underpinnings of that decision have been eroded by virtue of the federal experience since 1976, granting review over the narrow question advanced in the petition would not result in any disturbance of the court below's alternative holding. Thus, even assuming *Buckley* and its progeny should be revisited, it plainly should not be done pursuant to the ill-defined and narrow question presented by petitioners for review, or on the facially inadequate factual record presented here.

I. CINCINNATI'S LIMITATION ON CAMPAIGN EXPENDITURES PLAINLY VIOLATES THE FIRST AMENDMENT

"Beginning with *Buckley*, the Court's cases have found a 'fundamental constitutional difference between money spent to advertise one's views . . . and money contributed to the candidate to be spent on his campaign.' " *Colorado Republican Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2315 (1996) (Breyer, J.) (quoting *NCPAC*, 470 U.S. at 498). The Court has upheld restrictions on money going *to* the candidate because they entail only "a marginal restriction upon the contributor's ability to engage in free communication" and directly serve the government's compelling interest in avoiding "the appearance of improper influence" by large donors extracting a *quid pro quo*. *Buckley*, 424 U.S. at 20, 27. In stark contrast, the Court has unfailingly struck down any effort to restrict money spent *by* candidates (or political parties or PACs) because such restrictions constitute "direct and substantial restraints" on "political expression 'at the core of our electoral process and of the First Amendment freedoms.' " *Id.* at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). These "far greater restraints on the freedom of speech and association" must therefore "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45. Such direct restraints on core political expression may only be justified in the extremely rare circumstance where the regulation is narrowly tailored to a compelling government interest.[7]

Most pertinent here, it is firmly established that limitations on campaign-related expenditures are plainly not

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[7] *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251-52, 256 (1986); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990); *NCPAC*, 470 U.S. at 496.

justified by the government's interest in preventing the appearance of *quid pro quo* corruption. The Court directly stated this in *Buckley* and has consistently reaffirmed it ever since. The *Buckley* court directly held that the "markedly greater burden on basic freedoms caused by [spending limits] thus *cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitation.*" 424 U.S. at 44 (emphasis added). Although the interest in eliminating the appearance of corruption had been offered in support of expenditure limitations, the Court squarely held that "[no] government interest that has been suggested is sufficient to justify the restrictions on the quantity of political expression." *Id.* at 55. Thus, "the First Amendment *requires* the invalidation of . . . ceilings on overall campaign expenditures" since the "First Amendment simply cannot tolerate [this] restriction on the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 58, 54 (emphasis added).[8]

Just two Terms ago, the Court reaffirmed that the "central holding in *Buckley* . . . is that spending money on one's own speech must be permitted. . . . " *Colorado*, 116 S. Ct. at 2321 (Kennedy, J.). Indeed, the *Colorado* decision *extended Buckley* to invalidate restrictions on spending by political parties precisely because the "Constitution . . . grants to individuals, *candidates*, and ordinary

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[8] *See also id.* at 262 (White, J., dissenting) ("The court concludes that the Constitution denies Congress the power to limit campaign expenses; federal candidates – and I would suppose state candidates, too – are to have the constitutional right to raise and spend unlimited amounts of money in quest of their own election."); *NCPAC*, 470 U.S. at 497. ("In *Buckley* we struck down the FECA's limitation on individuals' independent expenditures because we found no tendency in such expenditures, . . . to corrupt or to give the appearance of corruption.")

political committees the right to make unlimited independent expenditures." 116 S. Ct. at 2317 (Breyer, J.) (emphasis added).

The rationale for invalidating spending caps as a matter of law is quite straightforward. Limiting how much a candidate can spend is not directed at, much less narrowly tailored to, eliminating the appearance of *quid pro quo* corruption created by large contributions to the candidate. As the *Buckley* court explained, " '[i]f a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all the money for political communication?' " *Id.* at 56 n.64 (quoting *Buckley v. Valeo*, 519 F.2d 821, 917 (D.C. Cir. 1975) (Tamm, J., concurring in part and dissenting in part)). Since all the money spent by the candidate is either his own or collected in amounts small enough to avoid any potential *quid pro quo* corruption, limiting the expenditure of those legally acquired monies cannot possibly affect or reduce any perception that large donors are somehow controlling the candidate. "There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate." *Id.* at 56. Rather, the true purpose of such spending caps is the facially illegitimate one of "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others." *Id.* at 48-49.[9]

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[9] *See also id.* at 56-57 ("[E]qualization of permissible campaign expenditures might not serve to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition."); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("[P]olitical 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.").

The lower court and dissenting opinion in *Buckley* nonetheless hypothesized a potential link between spending caps and contribution limits: the ability to spend a lot of money creates a "temptation" to violate the contribution regulations. *Id.* at 264-65 (White, J., dissenting). *See Buckley*, 519 F.2d at 840 (On the basis of extensive findings, "Congress concluded that [ ] corrupt and pernicious practices are more likely to occur when there are no effective limits on the amount of campaign expenditures."). The Court squarely rejected this strained assertion as "not persuasive." *Buckley*, 424 U.S. at 55. Since the statutory enforcement mechanisms were sufficient to "police the contribution provisions" and detect "illegal contributions," those provisions "undercut[ ] whatever marginal role the expenditure limitations might otherwise play in enforcing the contribution ceilings." *Id.* at 56.

In the face of all this, petitioners nevertheless maintain that the *Buckley* court did not reject the court of appeals' strained "temptation" argument as insufficient to satisfy strict scrutiny, but simply temporarily struck down FECA's expenditure limitations until it could be determined whether "illegal contributions" would result without such spending caps. Pet. at 16. But, as the language cited above makes clear, the *Buckley* Court found the lower court's reasoning "not persuasive" as a matter of law and held FECA's expenditure limitations *facially* unconstitutional because such limitations "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Buckley*, 424 U.S. at 44.

Petitioners' reading of *Buckley* is also contrary to the most basic principles of narrow tailoring under strict scrutiny analysis, as the cases subsequent to *Buckley* directly establish. Under petitioners' theory, government may prophylactically impose "direct and substantial" restrictions on the "core political expression" of 99% of candidates because 1% of candidates will be "tempted,"

in the exercise of this constitutionally-guaranteed freedom, to violate another law which carries draconian penalties for noncompliance. It is axiomatic, however, that any attempt by government to prohibit all individuals from exercising their free speech rights because some individuals may abuse this freedom is a "fatally overbroad response to that evil." *NCPAC*, 470 U.S. at 498. The state may not "lump" candidates spending their own money, or legally acquired money, in with candidates who have violated contribution limits "and refuse to employ more precise measures to separate one kind [of candidate] from the other." *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *see NCPAC*, 470 U.S. at 498.

In any event, even assuming *Buckley*'s invalidation of expenditure limitations was premised on an empirical prediction that they are unnecessary to avoid "illegal contributions," this provides no aid to petitioners here. For in this case, as in *Buckley*, "[t]here is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions." *Buckley*, 424 U.S. at 55-56.[10] There is not a scintilla of evidence that any Cincinnati City Council candidate would violate the contribution ceilings absent spending caps and, as the court below correctly noted, there could not possibly be because "contribution limits were not enacted until *after* the spending

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[10] Petitioners consistently assert, without any support, that *Buckley* was decided on a "slender factual record." Pet. at 25 n.32. This is demonstrably untrue. The district court in *Buckley* "entered a memorandum order adopting *extensive* findings of fact" and FECA was supported by an extraordinarily voluminous congressional record and findings, which dwarf the miniscule record present here. *Buckley*, 424 U.S. at 10 (emphasis added); *see Buckley*, 519 F.2d at 837-38.

limit at issue here." App. at 20 (emphasis added). All we have here, as in *Buckley*, is a legislative prediction that expenditure limitations will "reduce the incentive" to violate contribution ceilings. Since Congress' prediction in this regard is facially inadequate, so too is the City Council's. 424 U.S. at 55. *See Colorado*, 116 S. Ct. at 2317 (" 'When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.' ") (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2469-70 (1994)); *NCPAC*, 470 U.S. at 498 ("On this record, [incentives to violate contribution limits] remain[ ] a hypothetical possibility and nothing more.").

Moreover, there is not a scintilla of evidence that any *federal* candidate for any federal office where unlimited spending is permitted has ever violated any restriction on contributions. Thus, even assuming that *Buckley*'s invalidation of expenditure limitations was premised on an empirical prediction that contribution limits would be adhered to absent such caps, there is absolutely no evidence in the record to undermine the Court's entirely accurate prediction. Consequently, although the petitioners make the unsubstantiated claim that the City Council relied heavily on the "federal experience" in enacting its Ordinance,[11] it can produce no evidence from that federal experience which undermines the only aspect

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[11] Petitioners contend that the "City's action drew, in part, on the two decades of federal election experience. . . . " Pet. at 2 (citing R. No. 38, Exh. 7, Sterne Aff. at 4-5). However, a review of this affidavit, as well as the entire record, shows it is devoid of *any* reference to the "federal election experience." The newspaper articles in the *Washington Post*, *The New York Times* and the *Boston Globe* referred to in the petition were never entered into the record or relied on by the City Council. *See* Pet. at 11 n.13, n.14; *id.* at 19 n.26.

of the *Buckley* opinion that even allegedly rests on "empirical grounds," *i.e.*, expenditure limits are unnecessary to "police contributions."

Apparently recognizing this fatal deficiency, petitioners attempt to change the subject. Since they cannot assert that the absence of federal expenditure caps has led to *violations* of FECA's contribution limits, they argue that federal contribution regulations are not sufficiently *far-reaching* to prevent the appearance of *quid pro quo* corruption. Specifically, relying solely on a law review article co-authored by petitioners' counsel of record, they argue that the practice of "bundling" small contributions in federal elections allows some donors to still exercise improper disproportionate influence over candidates. Pet. at 18-19 (citing Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 Yale L. & Pol'y Rev. 273 (1993)). While, if properly substantiated, such evidence might provide an adequate justification for a Cincinnati law prohibiting "bundling," it provides no basis, under *Buckley* and its progeny, for imposing expenditure limits that have absolutely no effect on the "evil" practice of bundling.

As the court below patiently explained, *Buckley*'s condemnation of expenditure caps was not premised on any public policy assessment of how "effective" FECA's contribution regulations would be in achieving Congress' goal of reducing large donor influence – such assessments are for the legislative, not judicial, branch. App. at 19. Rather, it was premised on the unassailable notion that – *regardless* of how effective contribution limits are in reducing the appearance of improper influence – limiting campaign-related expenditures cannot possibly be narrowly tailored to accomplish that goal. The presence or absence of restrictions on how a candidate *spends* his money has, by definition, absolutely no effect on whether the contributions *to* the candidate are bundled or unbundled. The Cincinnati Ordinance, however, prohibits

all candidates from spending over $140,000, without regard to whether they have received any contributions or whether those contributions are bundled. At the same time, moreover, the Ordinance does nothing to prohibit the alleged evil of bundling itself. By definition, then, expenditure caps are not a necessary nor least intrusive means of eliminating any abuses associated with bundling.[12] Rather, since Cincinnati prohibits bundlers and nonbundlers alike from expending their own campaign funds, and does not even prohibit the act of bundling, it is obviously "fatally overbroad" and cannot satisfy strict scrutiny. *NCPAC*, 470 U.S. at 498.

As the court below noted, even if there is some ambiguity in *Buckley* concerning whether the permissibility of expenditure caps turned on the "effectiveness" of contribution limits, rather than the absence of narrow tailoring, subsequent campaign finance cases have established that limiting campaign spending, like all other restrictions on fundamental speech, are subject to a strict requirement of narrow tailoring. App. at 18-19. Both *Colorado* and *NCPAC* struck down expenditure limitations precisely because "the effort to link either corruption or the appearance of corruption to independent expenditures by PACs, whether large or small, simply does not pass [the First Amendment's rigorous] standard of review." *NCPAC*, 470 U.S. at 501. Indeed, the Court in *Colorado* rejected an argument indistinguishable from that offered by petitioners here, *i.e.*, a ban on political parties'

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[12] *See, e.g., Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (First Amendment requires the government to select "the least restrictive means to further [its] articulated interest" in burdening free speech); *Village of Schaumburg*, 444 U.S. at 637 (Restrictions on free speech must be "narrowly drawn regulations designed to serve [a state's legitimate] interests without unnecessarily interfering with First Amendment freedoms.").

independent expenditures is justified because the limits on contributions to political parties are not strict enough. In words equally applicable here, the Court responded:

> We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on [bundling] . . . . But we do not believe that the risk of corruption present here could justify the "markedly greater burden on basic freedoms caused by" the statute's limitation on *expenditures*.

Colorado, 116 S. Ct. at 2316 (quoting *Buckley*, 424 U.S. at 44) (emphasis in original).

Petitioners note that these post-*Buckley* cases struck down limits on independent expenditures by groups that were not candidates for elective office. Pet. at 16. But surely petitioners are not seriously suggesting that the rights of candidates to directly convey their own political message to voters is somehow inferior to other groups who have a less direct stake in the electoral result. To the contrary, "it is of *particular* importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidate's personal qualities and their positions on vital public issues for choosing among them on election day." *Buckley*, 424 U.S. at 52-53 (emphasis added). *See id.* at 53. (The need for public discussion "applies with special force to candidates for public office.")

If anything, the question of expenditures by outside groups is more difficult because such expenditures may not be truly "independent" and thus could be tantamount to a *de facto* contribution to the candidate, with the potential for improper influence or the appearance of improper influence. *NCPAC*, 470 U.S. at 498. Since the Court has invalidated efforts to limit outside groups' spending notwithstanding this potential for *quid pro quo* corruption,

limiting candidate spending is *a fortiori* unconstitutional since the candidate obviously cannot improperly influence himself. In short, it is quite impossible to "see how a Constitution that grants to individuals, [political parties], and ordinary political committees the right to make unlimited independent expenditures could deny the same right to [candidates]." *Colorado*, 116 S. Ct. at 2317.

Finally, even if direct restrictions on core political speech could be justified without any actual factual record, there is no basis for *assuming* that spending caps would reduce the influence of large donors or "bundlers" since the most plausible assumption is precisely the opposite. A contribution of $10,000 (through "bundling" or a violation of contribution limits) yields far greater influence over a candidate limited to spending $140,000 than it does on a candidate who spends $300,000. The inexorable mathematical conclusion is that a large donor's (or "bundler's") contribution will represent a greater percentage of a candidate's total contributions (and thus increase his relative influence) under a legal structure that limits expenditures than under one which does not.

Thus, the court below was quite correct to hold that the "federal experience" cannot bolster Cincinnati's cap on expenditures because (1) the federal experience *confirms Buckley*'s prediction of compliance with contribution limits without expenditure caps and (2) the alleged "loopholes" in federal contribution laws might justify Cincinnati's elimination of those "loopholes," but cannot rationally "undermine the Supreme Court's conclusion that spending restrictions are not narrowly tailored to addressing the problem of the corrupting nature of money and politics." App. at 21.[13]

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[13] To be sure, the court below quite naturally interpreted petitioners' vague allusions to the "ineffectiveness" of

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contribution limits in recent federal elections as referring to the "soft money" loophole, since this has been the principal loophole cited in press accounts of recent elections, as well as the very law review articles cited by *petitioners*. Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1144-45 (1994); Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 Yale L. & Pol'y Rev. 273, 327 (1993). In response, petitioners no longer advance the "soft money" loophole as part of the "federal experience" which purportedly undermines *Buckley*'s views on contribution limits' "effectiveness" and concede that "abuses with the soft-money loophole . . . do not explain the insufficiency of contribution limits in federal candidate campaigns." Pet. at 20 n.27. The City's tactical retreat on this point is well advised since the most publicized "soft money" abuses occurred in the recent *presidential* election campaign, the *only* federal elections with expenditure limitations of the sort petitioners seek to impose. *See Buckley*, 424 U.S. at 85-109 (voluntary spending limits in exchange for public financing in presidential election campaigns constitutional); 26 U.S.C. § 6096, *et seq.* Thus, if the Court is to adjudicate fundamental First Amendment principles on the basis of press clippings concerning the federal experience, these newspaper stories demonstrate, if anything, that expenditure limitations *increase* incentives to violate campaign finance laws.

In addition, petitioners are quite correct that an evaluation of the "federal experience" in adjudicating the Cincinnati Ordinance must be based on a proper "record presented" and not judicial notice of law review articles or press accounts. Pet. at 20 n.27. Since petitioners' only information concerning the "federal experience" is their citation of such articles in appellate briefs, and not any specific evidence or materials relied upon by the City Council at the time of enactment, there is no proper evidentiary support for petitioners' *post hoc* invocation of that experience in support of the challenged Ordinance. But since the City relied exclusively on such articles to demonstrate the

II. PETITIONERS OFFER NO NEW FACTS OR INTERESTS IN SUPPORT OF CINCINNATI'S EXPENDITURE LIMITATION ORDINANCE

Petitioners' other major contention is that Cincinnati's unique facts and government interests distinguish its spending limits ordinance from the virtually identical one enacted by the federal legislature and invalidated by *Buckley*. As an initial matter, of course, petitioners' emphasis on the stark differences between Cincinnati and federal elections, which purportedly distinguish *Buckley*, completely undermines their simultaneous assertion that the federal election experience is directly transferable to the local Cincinnati situation. More fundamentally, all the interests and factual allegations proffered by Cincinnati are indistinguishable from those which were directly considered and rejected in *Buckley*.

First, the City suggests that it has discovered a new and compelling interest served by expenditure limitations: it reduces the amount of time candidates devote to fundraising and thus avoids "a real and detrimental impact on the ability of elected officials to govern." Pet. at 22. But this very interest was advanced by Justice White's dissenting opinion in *Buckley*: "[L]imiting the total that can be spent will ease the candidate's understandable obsession with fundraising, and so free him and his staff to communicate in more places and ways unconnected with the fundraising function." *Buckley*, 424 U.S. at 265 (White, J., dissenting). *See id.* (Expenditure limits insulate candidates from "the influence inevitably exerted by the endless job of raising increasingly large sums of money.") The *Buckley* court properly found that

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alleged inadequacies of federal election law, their criticism of the court below for citing a similar article is quite incomprehensible.

this interest, like all other "suggested" government interests supporting expenditure caps, was not "sufficient to justify the restriction[s] on the quantity of political expression." 424 U.S. at 55.

As the court below correctly recognized, just as the First Amendment prohibits government from paternalistically informing the candidate that he is spending a "wasteful, excessive or unwise" amount of money, so too does it prohibit government from paternalistically informing the candidate that he is spending an "excessive" amount of time raising money. App. at 22 (quoting *Buckley*, 424 U.S. at 57). For, "[i]n the free society ordained by our Constitution it is not the government, but the people – individually as citizens and candidates . . . " – who make such determinations. *Buckley*, 424 U.S. at 57. Even assuming that government has a legitimate interest in regulating the amount of time *public* servants devote to fundraising, the Cincinnati Ordinance is nonetheless necessarily overbroad because it applies to nonincumbents, such as Respondent Kruse, who are not on the public payroll and who, as even the City admits, are most in need of spending large amounts to overcome incumbents' inherent advantages.[14] Even more obviously, the Ordinance is fatally overbroad because it applies to wealthy candidates – incumbents and challengers – who can spend their own money and thus devote no time to raising outside funds.

Moreover, this alleged interest in saving candidates' time is not properly presented in this case. First, the City

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[14] *See* Jt. App. II at 190 (Sterne Aff.); App. at 24 ("[S]pending limits . . . could instead serve only to protect incumbents and 'handicap a candidate who lacks substantial name recognition or exposure of his views before the start of the campaign.' ") (quoting *Buckley*, 424 U.S. at 56-57); *Buckley*, 424 U.S. at 31 n.33 ("[I]t is axiomatic that an incumbent usually begins the race with significant advantages.").

has advanced this time-saving rationale as a compelling interest underlying the Ordinance for the *first time* in this Court. It never advanced this policy as a compelling interest in the briefs to the courts below or in the affidavits by City Council members which purportedly described the interests underlying the Ordinance, but was raised only by *amici* on appeal. *See* App. at 22-23. Since a compelling government interest cannot properly be advanced by the *government's* counsel if it was not relied upon by the governmental body at the time of enactment, it follows *a fortiori* that an interest offered only by *amici* on appeal is facially insufficient to retroactively support any such law. *See United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."). In addition, there is no evidence in this record that any member of the City Council, or any other public employee, ever neglected his public duties in any way in order to raise money under the old regime where expenditures were unlimited.[15] The City also suggests that the Cincinnati situation is different than that confronted by *Buckley* because, *prior* to contribution limits, a small percentage of donors contributed a disproportionate amount of campaign funds and the cost of City Council campaigns are "skyrocketing." App. at 22. But, of

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[15] While the City's Campaign Finance Board (which recommended *against* expenditure limits) asserted in a conclusory manner that "unreasonable" amounts of time were spent on fundraising, it never suggested that this in any way detracted from anyone's public duties and no such assertion was made by any City Council member either when the Ordinance was contemplated or in the litigation-related affidavits filed by those members. *See* Jt. App. I at 124; Jt. App. I at 190-222, 251-53. Moreover, the League of Women Voters' report simply said that fundraising "*may*" detract from such public duties. Jt. App. I at 182-89 (emphasis added).

course, Congress made extensive findings in *Buckley* concerning both of these phenomena, and relied on them heavily in enacting FECA.[16] The *Buckley* court duly noted all of this, but properly rejected it as legally irrelevant because limiting the amount a candidate can spend does not reduce the influence of large donors – that problem can be dealt with only by eliminating large donors through contribution limits.[17] Indeed, since it is becoming exponentially more expensive for candidates to deliver their message to voters, limiting the amount they can spend exponentially *increases* the burden imposed on engaging in this core political speech.[18]

The City also makes the Delphic and ambiguous pronouncement that "the amount of money in politics" has created a "crisis in public confidence" and loss of "faith" in the electoral process. Pet. at 17 n.24. Needless

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[16] *See, e.g., Buckley*, 424 U.S. at 55 ("The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions."); *id.* at 57 ("The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns."); *Buckley*, 519 F.2d at 837 ("The record documents the interaction of ever-increasing campaign expenditures, and reliance on large contributions for money and special interests. . . . Just 2-3 percent, the wealthiest people in the country, are responsible for about 95 percent of the financing for congressional elections.").

[17] *See, e.g., Buckley*, 424 U.S. at 57 ("In any event, the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns.").

[18] *See Buckley*, 424 U.S. at 19 ("The electorates' increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.").

to say, this fails to distinguish *Buckley* because, as the voluminous congressional testimony conclusively established, the United States citizenry understandably had, at a minimum, the same concerns in the wake of Watergate, and FECA "was responsive to Congress' finding of a definite need for effective and comprehensive legislation in this (campaign finance) area to restore and strengthen public confidence in the integrity of the political process." *Buckley*, 519 F.2d at 840 (internal citations omitted); *see also id.* at 913 (Tamm, J., concurring in part and dissenting in part) (Interests advanced by the government as compelling include "the alienation from and disillusionment in the electoral process by this country's citizens."). Moreover, as the court below correctly noted, a broad-based assertion of public disillusionment with "money in politics" adds nothing tangible to the analysis concerning the legitimacy of interests advanced by the City Council in defense of the Ordinance. App. at 21. If a majority of the Cincinnati electorate is disillusioned because they believe it is "corrupt" or "unfair" that a candidate with more money can communicate his electoral message more effectively, they, like a majority of the City Council, nonetheless have no right to censor the wealthy candidates' speech to "level the electoral playing field" for poorer candidates. *Colorado*, 116 S. Ct. at 2312.

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Buckley, 424 U.S. at 48-49 (internal quotations and citations omitted). If the Cincinnati electorate is disillusioned

because they believe large donors exert undue influence through hefty campaign contributions, they can constitutionally solve this problem through contribution limitations.

As in *NCPAC*, while the City repeatedly invokes "appearance of corruption" like a mantra, it never informs the Court "precisely what the 'corruption' may consist of. . . . " 470 U.S. at 498; App. at 19 n.15. It is certainly not the narrowly defined corruption (or appearance thereof) that the Court has held the government has a legitimate interest in preventing, *i.e.*, "the financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497. Rather, the City clearly equates "corruption" with the core political speech protected in *Buckley* – the ability of some candidates to spend more than others and achieve a political advantage by doing so. *See* Jt. App. at 194 (Sterne Aff.) ("A wealthy candidate or one with wealthy supporters can pour tens of thousands into his or her own campaign.").

Finally, even if the right of individual candidates to engage in fundamental political speech is to be decided by public opinion polls, the City can provide no evidence suggesting that the absence of spending limits, as opposed to contribution restrictions, has caused any of the public dissatisfaction they identify. The citizenry's view that "large campaign contributors wield undue influence on the political system" presumably will be fully cured by the ordinance eliminating large campaign contributions. Pet. at 5 (internal quotations omitted). As the concurring opinion below correctly noted, there certainly is no basis for a contrary finding or assertion on this record since all the polling relied on was done *before*

the contribution limits law had been used in any campaign. App. at 30-31 (Cohn, J., concurring).

Petitioners also make much of the startling new "fact," unique to Cincinnati, that better-funded candidates are able to purchase more television time and "drown out" the competing message of candidates with fewer funds. Pet. at 23-34. But it is hardly a surprising revelation, unknown to the *Buckley* court, that television is an effective means of communicating with voters and that those with more money can use more of it. *Buckley*, 424 U.S. at 19-21. To the extent that some candidates do not have the means or savvy to purchase television advertisements in a timely manner, this is not a "*governmentally-imposed* barrier[ ] to participation," but a consequence of the candidate's own limited resources or incompetence. App. at 26. As the court below correctly noted, the First Amendment does not permit the government to "correct" this consequence of unequal resources by eliminating other candidates' ability to effectively deliver *their* message: " '[T]he principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression.' " App. at 26 (quoting *Buckley*, 424 U.S. at 49 n.55).[19] In any event, the only alleged example of a candidate being "blacked out" from purchasing desirable TV time is that of Mr. Yates, who

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[19] Petitioners claim that the court below did not deal with their assertion that "television advertising purchases . . . drown out the campaigns of less well-funded candidates," but the court plainly did consider, and reject, the City's assertion that "voters are deprived of hearing candidates with lesser resources because wealthy candidates effectively drown them out." Pet. at 28; App. at 23.

was elected in that campaign although he spent only $33,000 total. Jt. App. II at 211-12; *see also* Pet. at 6-7, 24. There is thus no evidence supporting the allegation of a systemic "black-out" or that such a "black-out" has any detrimental effect on candidates.

Thus, contrary to the petitioners' constant refrain, the court below did not fail to examine the facts and interests purportedly underlying the Cincinnati expenditure limit, it simply noted that these facts and interests were identical to those rejected in *Buckley* or legally insufficient or both.

III. *BUCKLEY* SHOULD NOT BE RECONSIDERED AND THIS CASE PRESENTS NO OPPORTUNITY TO DO SO

When reduced to its essence, petitioners' misleading recitation of "new" facts and government interests is simply a backdoor effort to have the Court implicitly overrule *Buckley* and replace it with an undefined and unworkable "fact-intensive" review of each local jurisdiction's campaign spending limits. It is plain, however, that basic principles of *stare decisis* prevent such an eviscera-tion of *Buckley* and that, in any event, this case is a particularly ill-suited vehicle to engage in any fundamental rethinking or revision of that well-established precedent.

On the most basic level, there is simply no basis for undoing the entire edifice of this Court's campaign finance jurisprudence. This Court has long recognized the "necessity" of following its own precedents. *See, e.g., Planned Parenthocd of S.E. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (per curiam); *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). As the Court has explained, *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and

thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez*, 474 U.S. at 265-66. On the rare occasions when the Court has departed from this principle, it has done so only when "the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). Far from being "manifestly erroneous," the Court's decision in *Buckley* was clearly correct insofar as limitations on campaign expenditures impose severe burdens on core political expression protected by the First Amendment. Nor has *Buckley* been "eroded" by subsequent cases or been "intolerable simply in defying practical workability." *Casey*, 505 U.S. at 854 (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)). To the contrary, the Court has repeatedly applied and extended the rule of *Buckley* in recent years. *See, e.g., Colorado Republican Campaign Comm. v. FEC*, 116 S. Ct. 2309 (1996); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985).

Even if the Court were inclined to substantially modify or discard *Buckley*, this case plainly does not present a viable opportunity for doing so. As an initial matter, the Court cannot do so because petitioners have not requested it to do so, at least in any forthright or comprehensible manner. Petitioners do not ask that this Court abandon the requirement that expenditure limits be narrowly tailored to a compelling governmental interest or in any way alter the straightforward principle that, as a matter of law, government has no legitimate interest in "equalizing the financial resources of candidates" by imposing spending caps. *Buckley*, 424 U.S. at 56. Nor do petitioners present any alternative formulation of the constitutional standard to govern expenditure limitations if *Buckley* is to be modified. Rather, they ask only that the Court "rule" that new facts and interests may be considered within *Buckley*'s strict scrutiny framework. But, as

we established at length above, both the majority and concurring opinions below did "consider" the City's allegedly new facts and interests. The court simply refused, quite properly, to treat *Buckley*'s normative, legal judgments as tentative empirical predictions to be relitigated *de novo* by each lower federal court or, alternatively, to second-guess *Buckley*'s "empirical" judgments when the City was unable to produce any credible factual allegations for doing so. Since the court below rejected the City's position on both legal *and* factual grounds, that ruling presents only a fact-intensive question not warranting this Court's plenary review.

More important, since the petition so narrowly frames the question for this Court's review, it inherently provides an inadequate basis to issue any broad legal principle that might guide the other jurisdictions which petitioners claim are considering expenditure limits. Since petitioners cannot plausibly maintain that the lower court failed to faithfully apply *Buckley* and its progeny, and since they are unwilling to ask the Court to overrule or modify those cases, it provides the Court with no opportunity to revisit *Buckley* in any serious way, even if it were so inclined.[20]

In addition, this case presents the weakest possible record for inferring that new facts or circumstances since 1976 have eroded the empirical or conceptual underpinnings of *Buckley*, at either the federal or local level. At the local level, since Cincinnati's contribution limits were never adopted or implemented until after it had enacted

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[20] *Cf. Colorado*, 116 S. Ct. at 2321 ("[T]he 'principles that animate our policy of *stare decisis* caution against overruling a longstanding precedent on a theory not argued by the parties.' ") (quoting *United States v. International Bus. Mach. Corp.*, 116 S. Ct. 1793, 1801 (1996)). *See* Supreme Court Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

expenditure limits, there is no possible basis for concluding that contribution limits alone were inadequate to address whatever perceived electoral evils were to be cured by expenditure limits. At the federal level, the sum total of the record on the "federal experience" is two newspaper articles on the *1996* elections, law review articles on the "soft money" loophole (which the City now admits is irrelevant) and a single law review article by petitioners' counsel on "bundling" – hardly an adequate basis for any informed judgment about the lessons of federal campaign finance in the wake of *Buckley*. This is particularly true since there is absolutely no evidence on the only empirical issue even arguably left open by *Buckley, i.e.*, whether expenditure limits are necessary to "police" adherence to contribution limits.

Additionally, the City's schizophrenic alteration between asserting that the federal evidence supports expenditure caps in Cincinnati and asserting that Cincinnati is markedly different from the federal situation, renders any coherent factual analysis impossible. Even more important, as the court below correctly noted, petitioners' own evidence and arguments demonstrate that Cincinnati is not a jurisdiction where candidates need significant amounts of cash to succeed in the electoral process or communicate with voters. Four of the nine current City Council members were elected while spending less than $140,000, and one spent as little as $33,000. Pet. at 7.

Moreover, as a matter of law, all of the "new" facts and interests presented by Cincinnati, even if demonstrably true and relevant, cannot justify the expenditure limit Ordinance because all of these interests and facts were developed after-the-fact by counsel in connection with this litigation, but were never considered by the City Council when the law was enacted. It is well-established, however, that a governmental entity may not satisfy strict scrutiny through hypothesized *post hoc* justifications or evidence that was not before the legislature at the time of

enactment. *United States v. Virginia*, 116 S. Ct. at 2275 ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."); *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996). Specifically, in this case, (1) all relevant Cincinnati-specific information (such as large donor funding, public opinion polling, affidavits on the television ad "black-out" phenomena) was gathered after 1995 in connection with this litigation; (2) none of the newspaper or law review articles on the "federal experience" nor the *1996* federal elections was before the City Council in 1995 and (3) the City never asserted that its interest in saving candidates' time motivated passage of the legislation prior to its petition in this Court.[21]

Finally, adopting petitioners' procrustean interpretation of *Buckley* can only create an unworkable and hopelessly confused standard for adjudicating the permissibility of spending limits. As best we can discern, the City proposes a rule where the constitutional validity of expenditure caps varies from jurisdiction to jurisdiction depending on specific fact-finding concerning what litigation-related polling says about the citizenry's "faith in democracy," the time candidates spend on fundraising, the extent to which all candidates can purchase valuable television advertisements or some undefined combination of the above. Under this regime, the First Amendment would have an "accordion-like quality" where

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[21] In this regard, the City seems to suggest that the lower court somehow misapplied the summary judgment standard by requiring a full factual showing at this stage of the litigation. Both lower courts, however, expressly accepted all of the City's factual allegations as true, but correctly found that the City had not offered any evidence which supports a legally sufficient interest, much less the "significant probative evidence" that must be offered in response to a summary judgment motion. App. at 8-9; *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986).

candidates in Cleveland have a right to unlimited campaign spending that is denied to candidates in Cincinnati. *Defunis v. Odegaard*, 416 U.S. 312 (1974) (Douglas, J., dissenting). Worse still, the most "corrupt" cities with the most disillusioned citizenry could justify expenditure limits, while those relatively content with city elections and government could not, because the citizens of the latter city retain their "faith in democracy." This creates the utterly perverse result that corrupt cities can limit the expenditures of "reform" candidates, who seek to challenge corrupt incumbents, but need to spend a lot of additional money to overcome those incumbents' name recognition and other advantages.

In sum, petitioners cannot plausibly challenge *Buckley*'s holding on expenditure limits under fundamental principles of *stare decisis* and, presumably as a consequence, have not offered any viable standard with which to replace it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHRISTOPHER P. FINNEY
DAVID R. LANGDON
FINNEY, BACON & STAGNARO CO., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208
(513) 533-2996

MICHAEL A. CARVIN*
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
2000 K Street, N.W., Suite 401
Washington, D.C. 20006
(202) 822-8950

Counsel of Record

City of Cincinnati

An Ordinance No. 336-1995

AMENDING Title I of the Cincinnati Municipal Code, by ordaining supplementary Chapter 117, Campaign Finance, to provide contribution limits and disclosure requirements for Councilmanic candidates under the authority of Article IX Section 1 of the Charter of the city of Cincinnati, which was amended by vote of the electors on May 3, 1994, to permit council to adopt by ordinance campaign finance provisions which may differ from or supplement those provided by state law.

WHEREAS, on May 3, 1994, the electors of the city of Cincinnati approved an amendment to the Charter of the city of Cincinnati which permits the City Council to pass legislation which differs from state law in the area of campaign financing, campaign contributions and campaign expenditures; and

WHEREAS, on June 29, 1994, Council created a Campaign Finance Advisory Board to evaluate and recommend to Council various proposals in the matter of campaign financing, campaign contributions and campaign expenditures; and

WHEREAS, on June 7, 1995 the Campaign Finance Advisory Board delivered its final report to the council in which the Board found that there is a view widely held among voters that the circumstances of large financial contributions give the appearance of the exercise of undue influence in electoral campaigns; that the costs of such campaigns have escalated to such a degree that significant adverse effects including the limitation of

competition in elective races and inordinate amounts of time spent fundraising have resulted and that the availability of more timely public information regarding the financial circumstances of electoral contests is desirable; now therefore,

BE IT ORDAINED by the council of the city of Cincinnati, state of Ohio:

Section 1. That Chapter 117 of Title I of the Cincinnati Municipal Code is hereby ordained to read as follows:

CHAPTER 117. CAMPAIGN FINANCE

§ 117-1. Definitions.

For the purposes of this chapter the words and phrases defined herein shall have the meanings ascribed to them in Title 35. Elections, of the Ohio Revised Code, unless another meaning is ascribed to them in this chapter. Definitions contained in the Ohio Revised Code otherwise applicable to the provisions of this chapter which have been altered by the provisions of Amended Substitute Senate Bill 8, signed by the Governor of the State of Ohio on May 24, 1995 shall be incorporated herein upon the effective date of this ordinance, whether or not the provisions of that bill have taken effect.

§ 117-1-C. Contributions.

"Contribution" shall mean a loan to a candidate by other than a financial institution as defined in Section 5725.01 O.R.C. or one to be repaid by a person other than the candidate, a

gift, deposit, forgiveness of indebtedness, donation, advance, payment, transfer of funds or transfer of anything of value, and the payment by any person other than the person to whom the services are rendered for the personal services of another person, which contribution is made, received, or used for the purpose of influencing the results of an election. "Contribution" shall not include an independent expenditure or uncompensated volunteer services.

§ 117-1-F. Fundraising Period.

"Fundraising period" shall mean that period commencing three hundred days prior to a councilmanic election and ending on December 31 of that year.

§ 117-1-I. Independent Expenditures.

"Independent expenditures" shall mean expenditures which in express terms advocate the election or defeat of an identified candidate but are made without the consent of, in coordination, cooperation or consultation with, or at the request or suggestion of any candidate or candidates, or of the campaign committee or agent of the candidate or candidates. Expenditures by a political party which in express terms advocate the election, or defeat of a candidate shall not be considered independent expenditures.

§ 117-1-P. Political Party.

"Political party" shall mean a political party as defined in Section 3517.01(A) O.R.C., and

shall also include any committee, association or organization recognized as a political party by any federal court and any other committee, association or organization which files a petition signed by qualified electors in a form and manner that the same would be eligible signatures for the presentation of a charter initiative amendment under the constitution of the state of Ohio totaling at least 5% of the number of people voting at the previous election for councilmanic offices in the city of Cincinnati. Such petition shall declare the intent of the circulators of organizing a political party, the name of the party and its intent to participate in the next councilmanic election taking place not less than 120 days after the date of filing of the petition. For the purposes of the contribution limits contained in this chapter, a political party shall include any federal, state or county party affiliated with the political party making a contribution.

§ 117-3. Fundraising Period Restrictions.

The candidate or campaign committee of a candidate for the council may solicit and receive contributions no earlier than three hundred days prior to the date of a councilmanic election and no later than December 31 of that year, There is no restriction on the amount of unexpended contributions raised in one fundraising period which may be carried over into a subsequent fundraising period.

§ 117-5. Contribution Limits.

No individual shall make and no candidate or campaign committee for a candidate for the

council shall solicit or accept a contribution or contributions to the candidate or campaign committee of a candidate for the council in violation of state election law. No individual shall make nor shall any candidate or campaign committee for a candidate for the council solicit or accept from an individual a contribution or contributions to the a [sic] candidate or the campaign committee of a candidate for the council aggregating more than $1,000 during a fundraising period.

No political action committee or campaign committee of another council candidate or campaign committee of another incumbent councilmember shall make and no candidate or campaign committee at any candidate for the council shall solicit or accept a contribution or contributions to the candidate or campaign committee of a candidate for the council in violation of state election law. No political action committee or campaign committee of another council candidate or campaign committee of another incumbent councilmember shall make and no candidate or campaign committee of a candidate for the council shall solicit or accept from a political action committee or campaign committee of another council candidate or campaign committee of another incumbent councilmember a contribution or contributions to a candidate or campaign committee of a candidate for the council aggregating more than $2,500 during a fundraising period.

No political party or legislative campaign fund shall make and no candidate or campaign committee of a candidate for the council shall solicit or accept a contribution to the candidate

or campaign committee of a candidate for the council from a political party or legislative campaign fund in violation of state election law. No political party or legislative campaign fund shall make and no candidate or campaign committee of a candidate for the council shall solicit or accept a contribution or contributions from a political party or legislative campaign fund aggregating more than $10,000 during a fundraising period. An expenditure by a political party shall not be considered a contribution by the political party if the purpose of the contribution is to inform primarily the party's members of its activities or endorsements, or for voter contact such as sample ballots, absentee voter ballot application mailings, voter registration or get-out-the-vote activities.

In-kind contributions consisting of goods and compensated services shall be assigned a fair market value by the candidate or campaign committee of a candidate for the council and shall be subject to the same limitations and reporting requirements as other contributions.

The provisions of this section shall be in force and take effect for the fundraising period applicable to any councilmanic election occurring subsequent to November, 1995.

§ 117-7. Reporting Requirements; Disclosure.

In addition to the reporting requirements contained in Section 3517.10 O.R.C., every candidate or campaign committee, political action committee, legislative campaign fund and political party that either received a contribution or made an expenditure in connection with the nomination or election of any candidate to the

council shall file a full, true and itemized statement, made under penalty of law, setting forth in detail the contributions and expenditures in the same form and manner required under state law, no later than four p.m. of the following dates:

(a) The sixtieth day before a councilmanic election to reflect contributions received and expenditures made from the close of business on the last day reflected in the last previously filed statement, if any in that calendar year, to the close of business on the sixty-eighth day before the election;

(b) During the period beginning on the nineteenth day before a councilmanic election extending through the day of that election, each time a contribution from a contributor that causes the aggregate amount of contributions received from that contributor during that period to equal or exceed $500.00, the campaign committee shall file a five-business-day statement reflecting that contribution. The five-business-day statement shall be filed not later than five business days after receipt of the contribution.

The statements required under the provisions of this section shall be filed in addition to any other statements required under this chapter or the provisions of state law and notwithstanding any provisions of state election law which exempt from reporting requirements contributions under a minimum amount.

Campaign finance reports shall be filed with the clerk of council of the city of Cincinnati and the Hamilton County Board of Elections.

In addition to the requirements of Section 3517.10 O.R.C. concerning the contents of statements to be filed, all such statements filed regarding city council candidates under the provisions of this section or any section of the Ohio Revised Code shall contain the residence address, employer, or if self-employed, the occupation of each individual contributor who contributes more than $100 in any fundraising period.

§ 117-9 Rules; Investigations.

The director of the office of contract compliance and investigations shall adopt rules necessary for the administration and enforcement of the provisions of this chapter.

The director of the office of contract compliance and investigations shall review all reports filed with the clerk of council under the provisions of this chapter for compliance with this chapter and shall investigate any matters which to the director appear to conflict with or violate any of the provisions of this chapter.

Upon presentation to the director of the office of contract compliance and investigations of a sworn affidavit of any person, made on personal knowledge, setting forth any failure to comply with or any violation of the provisions of this chapter the director shall proceed to investigate the charges made in the affidavit.

If the director of the office of contract compliance and investigations finds a violation the director shall impose a civil fine in accordance with the schedule of fines contained in this chapter, the imposition of which shall be subject

to appeal under the provisions of Section 119.12 O.R.C. Any fines collected under the provisions of this chapter shall be deposited in the General Fund of the city of Cincinnati.

If the director of the office of contract compliance and investigations finds, after investigation of an allegation of failure to comply, that a violation has not occurred the director shall prepare a report of those findings which shall be kept on file in the office of contract compliance and investigations for a period of one year.

§ 117-99. Penalties.

Any individual, campaign committee, political action committee, political party or legislative campaign fund that makes a contribution to a candidate or the campaign committee of a candidate and any candidate or the campaign committee of a candidate that solicits or accepts a contribution in violation of the provisions of this chapter shall be fined an amount equal to three times the amount of the excess of the actual contribution over the amount of the contribution permitted by this chapter or three times the full amount of any contribution made, solicited or accepted at any time other than during the fundraising period.

In the event that a candidate's campaign committee returns to its source any contribution or contributions received from that source in excess of the amounts permitted under the provisions of this chapter or any contribution received at any time other than during the fundraising period, within five business days of the receipt of such excess contribution, such excess contribution shall not be considered to have

been solicited or accepted by such candidate or such candidate's campaign committee and the candidate will not be liable to a fine under the provisions of this chapter.

Any candidate or campaign committee, political action committee, legislative campaign fund or political party that fails to file any report required under the provisions of this chapter or fails to provide any information required in any such report shall be fined $100 dollars per day for each day of violation; except that any candidate or campaign committee, political action committee, legislative campaign fund or political party that fails to file a report or provide any information required in a report within the final nineteen days prior to an election shall be fined $200 dollars per day for each day of violation.

Section 2. The provisions of the laws of the state of Ohio pertaining to elections that are not inconsistent with the provisions of this chapter shall remain in full force and effect and shall apply in addition to the requirements of this chapter. In the event of a conflict between the provisions of the laws of the state of Ohio and the provisions of this chapter, the provisions of this chapter shall control.

Passed: October 11, A.D., 1995

/s/ Roxanne Qualls
Mayor

Attest: /s/ _____
Clerk

Section 3. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

EMERGENCY

City of Cincinnati

An Ordinance No. 9-1997

Doc. # 199602832

AMENDING Title I of the Cincinnati Municipal Code, by repealing and reordaining supplementary Chapter 117, Campaign Finance, to rename Chapter 117, Campaign Finance Contribution Limits and Disclosure, and to provide contribution limits and disclosure requirements for candidates for Council under the authority of Article IX, Section 1 of the Charter of the city of Cincinnati, which was amended by vote of the electors on May 3, 1994, to authorize Council to adopt by ordinance campaign finance provisions which may differ from or supplement those provided by state law.

WHEREAS, on May 3, 1994, the electors of the city of Cincinnati approved an amendment to the Charter of the City of Cincinnati that permits the City Council to pass legislation which differs from state law in the area of campaign financing, campaign contributions and campaign expenditures; and

WHEREAS, on June 29, 1994, Council created a Campaign Finance Advisory Board to evaluate and recommend to Council various proposals in the matter of campaign financing, campaign contributions and campaign expenditures; and

WHEREAS, on June 7, 1995, the Campaign Finance Advisory Board delivered its final report to the Council, in which the Board found that there is a view widely held among voters that the circumstances of large financial

contributions give the appearance of the exercise of undue influence in electoral campaigns; that the costs of such campaigns have escalated to such a degree that significant adverse effects, including voter mistrust, limitations of competition in elective races and inordinate amounts of time spent fundraising have resulted and that the actual or perceived ills of undue influence make contribution limits and more timely public information regarding the financial circumstances of electoral contests desirable; and

WHEREAS, on October 11, 1995, Council enacted Ordinance No. 336-1995, which ordained Chapter 117, Campaign Finance, and imposed various contribution limits, disclosure requirements and fundraising period limitations on Council campaigns; and

WHEREAS, upon further consideration of the various facets of campaign finance reform, the Council is of the opinion that Chapter 117, Campaign Finance, ought to be reordained as Chapter 117, Campaign Finance Contribution Limits and Disclosure and that Chapter 117 ought to contain a different fundraising period and permit the raising of funds for unpaid debt for the 1995 Council elections, as well as to amend various provisions of the Chapter to provide greater candidate accountability more definitive explanations of various limits and disclosure requirements; now, therefore,

BE IT ORDAINED, by Council of the city of Cincinnati, state of Ohio:

Section 1. That Chapter 117 of Title I of the Cincinnati Municipal Code is hereby reordained to read as follows:

CHAPTER 117. CAMPAIGN FINANCE CONTRIBUTION LIMITS AND DISCLOSURE

Sec. 117-1. Definitions.

For the purposes of this chapter, the words and phrases defined herein shall have the meanings ascribed to them in Title 35, Elections, of the Ohio Revised Code, unless another meaning is ascribed to them in this chapter.

Sec. 117-1-C. Contributions.

"Contribution" shall mean a loan to a candidate by other than a financial institution as defined in Section 5725.01 O.R.C. or one to be repaid by a person other than the candidate, a gift, deposit, forgiveness of indebtedness, donation, advance payment, transfer of funds or the transfer of anything of value, and the payment by any person other than the person to whom the services are rendered for the personal services of another person, which contribution is made, received, or used for the purpose of influencing the results of an election or for purposes for which a beneficiary of a campaign fund may be reimbursed pursuant to the provisions of Section 3517.13(O) of the Revised Code. "Contribution" does not include:

(a) Services provided without compensation by individuals volunteering a portion or all of their time on behalf of a person

(b) Ordinary home hospitality

(c) The personal expenses of a volunteer paid for by that volunteer campaign worker

(d) Any gift given to a state or county political party pursuant to 3517.101 [3517.10.1] O.R.C.

(e) Independent expenditures

Sec. 117-1-F. Fundraising Period For 1995 Unpaid Debt.

"Fundraising period for 1995 unpaid debt" shall mean that period commencing on the effective date of this ordinance and extending through June 1, 1997.

Sec. 117-1-G. General Fundraising Period.

"General fundraising period" shall mean, that two year period commencing on December 1 next following a regular municipal election and extending through November 30 next following the next subsequent regular municipal election except that a fundraising period which would have commenced on December 1, 1995 for the fundraising period ending on November 30, 1997, shall commence on the effective date of this ordinance.

Sec. 117-1-P. Personal Funds.

"Personal funds" shall mean moneys contributed to the campaign committee of a candidate by that candidate or by that candidate's spouse, parents, children, sons-in-law, daughters-in-law, brothers, sisters, grandparents, mother-in-law, father-in-law, brothers-in-law, sisters-in-law, or grandparents by marriage.

Sec. 117-1-P1. Political Party.

"Political party" shall mean a political party as defined in Section 3517.01(A) O.R.C., and shall also include any committee, association or organization recognized as a political party for any purpose by any federal court.

Sec. 117-3. Contribution Limits.

No individual shall make a contribution or contributions to the campaign committee of any one candidate for the council aggregating more than $1,000 during a general fundraising period and no campaign committee of a candidate for the council shall, solicit or accept from any one individual, a contribution or contributions aggregating more than $1,000 during a general fundraising period.

No political action committee, campaign committee of another candidate for the council, campaign committee of an incumbent council member or campaign committee for an office other than member of council shall make a contribution or contributions to the campaign committee of any one candidate for the council aggregating more than $2,500 during a general fundraising period and no campaign committee of a candidate for the council shall solicit or accept from any one political action committee, any one campaign committee of another candidate for the council, any one campaign committee of an incumbent council member, or any one campaign committee for an office other than city council, a contribution or contributions aggregating more than $2,500 during a general fundraising period.

No political party or legislative campaign fund shall make a contribution or contributions to the campaign committee of any one candidate for the council aggregating more than $10,000 during a general fundraising period and no campaign committee of a candidate for the council shall solicit or accept from any one political party or any one legislative campaign fund, a contribution, or contributions aggregating more than $10,000 during a general fundraising period.

For the purposes of this section:

(a) All contributions made by and all contributions solicited or accepted from political action committees that are established, financed, maintained, or controlled by the same corporation, organization, labor organization, continuing association, or other person, including any parent, subsidiary, division, or department of that corporation, organization, labor organization, continuing association, or other person, are considered to have been made by or accepted from a single political action committee.

(b) A "political action committee" does not include a political action committee that is organized to support or oppose a ballot issue or question and that made no contributions to or expenditures on behalf of a political party, campaign committee, legislative campaign fund or political action committee.

(c) All contributions made by and all contributions solicited or accepted from a national political party, a state political party and a county political party are considered to have been made by or accepted from a single political party and shall be combined with each other to

determine whether the contribution limits have been exceeded.

There is no restriction on the amount of personal funds which can be contributed to a candidate's own campaign committee.

There is no restriction on the amount of unexpended contributions raised in one general fundraising period which may be carried over into a subsequent general fundraising period.

Solely during the period designated "fundraising period for 1995 unpaid debt," the contribution limits set forth in this section apply separately to the fundraising period for 1995 unpaid debt and to the "general fundraising period" commencing on the effective date of this chapter, in accordance with and subject to all the provisions of Section 117-5 hereof, [example: an individual may make and a campaign committee may solicit and accept a $1,000 contribution for the retirement of 1995 unpaid debt through June 1, 1997 and also a $1,000 contribution during the general fundraising period which coincides, in part, with the fundraising period for 1995 unpaid debt, for purposes other than the retirement of 1995 debt].

Section 117-5. 1995 Unpaid Debt.

If the campaign committee of a candidate for the 1995 regular municipal election for the choice of members of council had unpaid debt as of December 31, 1995, that campaign committee may solicit and accept and individuals, campaign committees for candidates for council,

campaign committees for incumbent members of council, campaign committees for an office other than member of council, political action committees, political parties and legislative campaign funds may make additional contributions, commencing on the effective date of this chapter, through June 1, 1997 [fundraising Period for 1995 Unpaid Debt], to the applicable limitations prescribed under Section 117-3 of this chapter. Any such additional contributions that a campaign committee solicits or accepts or that an individual, campaign committee for a candidate for council, campaign committee for an incumbent member of council, campaign committee for an office other than member of council political action committee, political party or legislative campaign fund makes under this subsection shall not count toward the applicable limitations for any other fundraising period, including the fundraising period including the fundraising period [sic] ending November 30, 1997, if all of the following conditions apply:

(a) The campaign committee reports all debt remaining unpaid on December 31, 1995, showing the date the each debt was incurred and the outstanding balance of unpaid debt from each source. This statement is to be filed with the office of contract compliance and municipal investigations.

(b) Additional contributions for such unpaid debt are solicited and accepted only during the period from the effective date of this chapter through June 1, 1997.

(c) All additional contributions made under this provision relating to unpaid debt are used by the

campaign committee that receives them only to pay the debt of the committee reported under subsection (a) hereof.

(d) The campaign committee maintains a separate account for all additional contributions made under this section and uses moneys in that account only to pay the unpaid debt reported hereunder and to administer the account.

(e) The campaign committee stops accepting additional contributions after funds sufficient to repay the unpaid debt reported hereunder have been raised, and promptly disposes of any contributions received that exceed the amount of the unpaid debt by returning the excess contributions to the contributors or by giving the excess contributions to an organization that is exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code.

(f) The campaign committee reports, on or before July 1, 1997, in the same form and manner in which it reported all debt remaining unpaid as of December 31, 1995, a statement showing the disposition of each item of debt reported, the source of contributions used to repay such debt and the disposition of funds raised which were in excess of the amounts needed to pay the previously reported unpaid debt. This report is to be filed with the office of contract compliance and investigations.

Sec. 117-7. Reporting Requirements; Disclosure.

In addition to the reporting requirements contained in Section 3517.10 O.R.C., every campaign committee, political action committee, legislative campaign fund and political party that either received a contribution or made an expenditure in connection with the nomination or election of any candidate to the council shall file a full, true and itemized statement, made under penalty of law, setting forth in detail the contributions and expenditures in the same form and manner required under state law, no later than four p.m. of the following dates:

(a) The sixtieth day before a regular municipal election for the choice of members of the council to reflect contributions received and expenditures made from the close of business on the last day reflected in the last previously filed statement, if any, to the close of business on the sixty-eighth day before the election. In the event that this statement is the first such statement filed by a campaign committee of a candidate, for the council, then the statement shall reflect all contributions received and expenditures made since the date of the first contribution or expenditure made to or received by the campaign committee.

(b) During the period beginning on the nineteenth day before a regular municipal election for the choice of members of the council, extending through the day of that election, each time a campaign committee of a candidate for the council receives a contribution from a contributor that causes the aggregate amount of contributions received from that contributor during that period to equal or exceed $500, the campaign committee shall file a

five-business-day statement reflecting that contribution. The five-business-day statement shall be filed not later than five business days after receipt of the contribution. The statement required by this paragraph shall be filed in addition to any other statements required by this chapter.

Duplicates or copies of the statements required to be filed under the provisions of Chapter 3517 O.R.C. and additional statements required to be filed under the provisions of this chapter shall be filed with the office of contract compliance and investigations of the city of Cincinnati and the Hamilton County Board of Elections. Such reports shall be filed notwithstanding any provisions of state law which exempt from such requirements contributions received or expenditures made under a minimum amount.

In addition to the requirement of Section 3517.10 O.R.C. concerning the content of statements to be filed, all such statements filed regarding candidates for the council under the provisions of this section or any section of the Revised Code shall contain the residence address, employer, or if self-employed, the occupation of each individual contributor who contributes more that $100 in any general fundraising period.

Section 117-9. Rules; Investigations.

The director of the office of contract compliance and investigations shall adopt rules necessary for the administration and enforcement of the provisions of this chapter.

The director of the office of contract compliance and investigations or one designated by the director shall review all reports filed under the provisions of this chapter for compliance with this chapter and shall investigate any matters which to director appear to conflict with or violate any of the provisions of this chapter.

Upon presentation to the director of the office of contract compliance and investigations of a sworn affidavit of any person, made on personal knowledge, alleging any failure to comply with or any violation of the provisions of this chapter, the director shall proceed to investigate the allegations made in the affidavit.

Any statement required to be filed under the provisions of this chapter that is found to be incomplete or inaccurate by the director of the office of contract compliance and investigations shall be accepted on a conditional basis, and the person who filed it shall be notified by certified mail as to the incomplete or inaccurate nature of the statement. Within four business days after receipt of notice, the recipient shall file an addendum to the statement providing the information necessary to complete or correct the statement. In the case of a five-business-day statement, the director of contract compliance and investigations shall notify the person who filed the statement by telephone or facsimile transmission as soon as practicable, followed by notification by ordinary U.S. Mail. Within two business days after receipt of telephone or facsimile notice, the recipient shall file an addendum to the statement providing the information necessary to complete or correct the statement.

If the director of the office of contract compliance and investigations finds a violation, other than the filing of an incomplete or inaccurate statement that is timely completed or corrected by addendum as set forth in this section, the director shall impose a civil fine in accordance with the schedule of fines contained in this chapter, the imposition of which shall be subject to appeal under the provisions of the Ohio Revised Code applicable to appeals from administrative agencies. Fines imposed may be referred to the appropriate agency or office for collection. Any fines collected under the provisions of this chapter shall be deposited in the General Fund of the city of Cincinnati.

Section 117-11. Incorporation of Consistent Provisions of the Ohio Revised Code.

The provisions of the laws of the state of Ohio pertaining to campaign financing, campaign contributions and campaign expenditures that are not inconsistent with the provisions of this chapter shall remain in full force and effect and shall apply in addition to the requirements of this chapter, including, by way of example, Section 3517.08, **Personal Expenses, Expenditures,** thereof. In the event of a conflict between the provisions of laws of the state of Ohio and the provisions of this chapter, the provisions of this chapter shall control.

Sec. 117-99. Penalties.

Any individual who makes a contribution to the campaign committee of a candidate for the council in violation of the provisions of this chapter and knows that the

contribution the individual makes violates the provisions of this chapter and any campaign committee, political action committee, political party or legislative campaign fund that makes a contribution to the campaign committee of a candidate for the council in violation of the provisions of this chapter and any campaign committee of a candidate for the council that solicits or accepts a contribution in violation of the provisions of this chapter shall be fined an amount equal to three times the amount of the excess of the actual contribution over the amount of the contribution permitted by this chapter.

In the event that the campaign committee of a candidate for the council returns to its source any contribution or contributions received from that source in excess of the amounts permitted under the provisions of this chapter or any contribution received at any time other than during the fundraising period applicable to such contribution or contributions, within five business days of the receipt of such excess contribution, such excess contribution shall not be considered to have been solicited or accepted by the campaign committee of such candidate and the campaign committee of the candidate will not be liable to a fine under the provisions of this chapter.

Any campaign committee of a candidate for the council or other entity required to file a statement or statements under the provisions of Section 117-7 hereof, that fails to file any statement required under the provisions of this chapter or fails to provide any information required in any such statement shall be fined $100 per day for each day of violation; except that the campaign committee of any candidate for the council that fails to file a report or provide any information required in any

such report within the final nineteen days prior to an regular municipal election for the choice of members of the council shall be fined $200 per day for each day of violation.

Fines shall not be assessed for any period during which a statement filed has been determined to be incomplete or inaccurate by the director of the office of contract compliance and investigations and such statement has been accepted on a conditional basis. However, at the expiration of the applicable number of days in which to file an addendum to such statement, if no such addendum has been filed or the addendum that has been filed lacks the information requested, fines shall be assessed for each day of violation in accordance with the schedule set forth above.

The fines and penalties set forth in this Section are in addition to and not in lieu of any other fines or penalties which may apply to violations of the provisions of Chapter 3517 O.R.C.

Section 2. That the provisions of existing Chapter 117, Campaign Finance, of Title I of the Cincinnati Municipal Code are hereby repealed.

Section 3. That this ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety, and it shall go into effect forthwith. The reason for the emergency is the immediate necessity to provide campaign finance provisions tailored to the local government of the city of Cincinnati which are designated to further enhance the confidence of local voters in the integrity of

the electoral system in the city of Cincinnati at the earliest possible time.

Passed January 15 A.D., 1997

/s/ Roxanne Qualls
Mayor

Attest: /s/ _____
Clerk

I HEREBY CERTIFY THAT ORDINANCE NO. 9 1997 WAS PUBLISHED IN THE CITY BULLETIN IN ACCORDANCE WITH THE CHARTER ON 1-28-97.

/s/ _____
Clerk of Council

FILED
OCT 19 1998
OFFICE OF THE CLERK

No. 98-454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF CINCINNATI, *et al.*,
Petitioners,

v.

JOHN R. KRUSE, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Sixth Circuit

BRIEF AMICUS CURIAE OF THE SECRETARIES OF STATE OF CONNECTICUT, GEORGIA, MAINE, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, WEST VIRGINIA AND WISCONSIN, THE EXECUTIVE DIRECTOR OF CAMPAIGN SPENDING COMMITTEE OF HAWAII, THE DIRECTOR OF THE REGISTRY OF ELECTION FINANCE OF KENTUCKY, AND THE EXECUTIVE DIRECTOR OF ETHICS COMMISSION OF OKLAHOMA IN SUPPORT OF THE PETITIONERS

Donald B. Verrilli, Jr.*
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

October 19, 1998

**Counsel of Record*

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INTEREST OF AMICI

Amici include the following Secretaries of State: Miles Rapoport of Connecticut, Lewis Massey of Georgia, Dan Gwadosky of Maine, William Galvin of Massachusetts, Joan Growe of Minnesota, Eric Clark of Mississippi, Mike Cooney of Montana, Dean Heller of Nevada, William Gardner of New Hampshire, Stephanie Gonzales of New Mexico, James R. Langevin of Rhode Island, Jim Miles of South Carolina, Riley Darnell of Tennessee, Ken Hechler of West Virginia and Douglas LaFollette of Wisconsin.[1/] *Amici* also include: Robert Watada, Executive Director of Campaign Spending Committee of Hawaii, George Russell, Director of Registry of Election Finances of Kentucky, and Marilyn Hughes, Executive Director of Ethics Commission of Oklahoma. In these positions, they serve as chief election officers in their States. They thus have considerable experience with the issues raised in this case, and in particular have witnessed the serious threats that unlimited campaign spending poses to the integrity and health of the political process.

Amici seek review of the Sixth Circuit's decision in this case because they believe this Court should re-evaluate the principles of *Buckley v. Valeo*, 424 U.S. 1 (1976), in light of the practical realities of the campaign finance system that has evolved in this nation in the past quarter century. A number of States and localities have enacted campaign finance regulations similar to the one at issue here, based on their belief that such regulations are necessary to preserve the health of our democratic form of government, and to combat widespread public cynicism about the extent to which office holders and

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1/The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity made a financial contribution to the preparation or submission of this brief.

candidates must focus on the never ending process of garnering contributions, rather than on the process of governing itself. Many more States and localities would doubtless enact legislation similar to that at issue here if the perceived constraints of the *Buckley* decision were removed.

These initiatives respond to practical realities. Office holders and candidates do in fact have to spent ever increasing amounts of time raising funds. Their preoccupation with fundraising does in fact diminish their ability to fulfill their responsibilities as elected officials. Additionally, contribution limits (the only form of campaign finance regulation approved in *Buckley*) are so now routinely circumvented (through a variety of stratagems) that those limitations are no longer effective in preventing both the actuality and appearance of *quid pro quo* corruption of the political process. *Buckley v. Valeo* needs to be reconsidered in light of these practical realities.

STATEMENT

This case involves an ordinance passed by the City of Cincinnati in 1995 limiting overall expenditures for City Council campaigns to $140,000.[2/] The City enacted this limitation to address widespread loss of public confidence in the electoral process and in local government, a loss of confidence brought about by the unlimited campaign spending that characterized City elections. In particular, the City sought to combat the risk of actual *quid pro quo* corruption as well as its appearance, to free office holders from the ever increasing pressures of fundraising made necessary by the absence of

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2/City of Cincinnati Ordinance No. 336-1995, amended by Ordinance No. 9-1997.

limits on overall campaign spending, and for other purposes. The relevant facts related to the City's decision to limit overall campaign spending, and to the justifications for imposing that limitation, are fully set forth in the petition for certiorari and will not be repeated here.

For present purposes, it suffices to note that the City of Cincinnati is not alone in its perception that unlimited campaign spending threatens the health of our democratic institutions. Last year, the State of Vermont enacted campaign spending limits for its state elections, which will take effect in the year 2000. *See* Vt. Stat. Ann. tit. 17, § 2805a. The City of Albuquerque, New Mexico has enacted limitations on campaign spending for local elections. *See* Albuquerque, New Mexico Charter, art. XIII, Election Code § 4. The Supreme Court of Ohio revised its judicial ethics code to limit campaign spending for judicial elections. *See* Supreme Court of Ohio Code of Judicial Conduct, Cannon VII(C)(6). Many other States and localities are contemplating similar restrictions. These state and local initiatives respond to a growing perception that our electoral processes are coming to threaten the health of our democratic institutions.

REASONS FOR GRANTING THE PETITION

The petition for certiorari should be granted because there is a pressing need for re-examination of *Buckley v. Valeo*. That is so for four related reasons. First, campaign spending limitations of the kind at issue in this case can be (and in fact are) justified on the basis of content-neutral reasons that were never considered in *Buckley*, and should be considered by this Court now. Second, the First Amendment standard of review applicable to such content-neutral regulations has been clarified considerably in the decades since *Buckley* was decided, *see Turner Broadcasting System, Inc. v. FCC*, 117 S.

Ct. 1174, 1183, 1186-87 (1997), in ways that cast significant doubt on *Buckley's* method of analysis and ultimate result respecting campaign spending limitations. Third, the Court of Appeals' decision to deny the City any meaningful opportunity to develop a record to support its campaign spending limitations cannot be reconciled with this Court's recent decisions making clear that government is entitled to an opportunity to prove in court that the harms it seeks to address are real, and not merely speculative. Fourth, the *Buckley* decision stands as a significant barrier to reforms of the political process that are widely perceived as necessary to the health of our democratic system of government at the state and local (as well as the federal) level.

1. The campaign spending limitation struck down by the Sixth Circuit in this case serves important public interests that differ in critical respects from those evaluated by the Court in *Buckley*. The Sixth Circuit focused most of its analysis on only one of the justifications offered by the City; the need to combat risks of actual and perceived corruption of the political process. We believe the Sixth Circuit erred by assuming that *Buckley* foreclosed this justification, notwithstanding that the City had put forward a far more compelling factual showing in support of this justification than was available to the *Buckley* Court. *See* page 9, *infra*. But the City also advanced other justifications that were never considered by the *Buckley* court. Most importantly, the City enacted overall spending limitations in order to free council members and candidates from the enormously time consuming burden of perpetual fund raising that the prior system of unlimited campaign expenditures made necessary. That is a compelling interest in its own right, and provides an independent justification for campaign spending limitations.

a. The interest asserted by the City in defense of its campaign spending limits is, in essence, an interest in the quality of representation. The City seeks to eliminate the enormous burden of raising large campaign war chests. That this burden exists, and has come to dominate the professional lives of office holders and candidates is not open to serious question. *See* Petition for Certiorari at 11-14. *See generally* Vincent A. Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281-82 & nn.1-3 (1994). The problem the Ordinance at issue here addresses is that the incessant demands of fund raising effectively prevent elected representatives from fulfilling their professional duties. Elected officials spend so much of their time raising campaign funds that they do not have enough time remaining to master issues, communicate with constituents, hold hearings, or perform other essential parts of their job. This interest is not merely important; it is of constitutional dimension in its own right.

This problem is the direct result of the absence of overall limits on campaign spending, and will be addressed by such limits. Moreover, the fundraising burden on candidates is an outgrowth of the campaign finance regime that *Buckley* generated. By upholding limits on campaign contributions and coordinated expenditures while striking down campaign spending limits, the *Buckley* court established a legal structure that puts States and localities to an unpalatable choice. If they address the risks of corruption by imposing contribution limits, they force officeholders and candidates to spend most of their time raising campaign funds (because the huge aggregate funds needed to campaign effectively may only be raised in small increments). If they decide to free office holders and candidates from this burden by eliminating contribution limits,

they must endure the risk of actual and perceived corruption of the electoral process.

b. The Sixth Circuit believed that *Buckley* foreclosed consideration of this justification for overall spending limits. That is not correct. The justifications considered and rejected by the *Buckley* Court have almost nothing to do with the problem of how candidates spend their time. The *Buckley* Court rejected the argument that Congress could decide that campaign spending had become wasteful or excessive. The *Buckley* Court also held that the record presented in that case did not support the argument that overall spending limits were needed as an additional means to promote compliance with contribution limits. 424 U.S. at 56. The *Buckley* Court simply did not consider the candidate time-protection rationale the City offers here.

According to the Court of Appeals, that rationale was nevertheless foreclosed because the "need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns." Pet. App. 22a. The court reasoned that "because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money . . . cannot serve as a basis for limiting campaign spending." *Id.* But that puts the cart before the horse. The *question* before the Sixth Circuit was whether the candidate protection rationale provided an alternative basis sufficient to justify overall campaign spending limits. *Buckley* would foreclose that rationale only if *no* rationale was sufficient to justify such restrictions. We do not read *Buckley* as foreclosing any possibility of justifying campaign spending limits. At a minimum, however, the Sixth Circuit's holding makes clear the need for guidance from this Court as to whether such restrictions may be imposed under appropriate circumstances. Otherwise, the Sixth Circuit's ruling will effectively prohibit States and other localities within

the Circuit from enacting campaign spending limits justified on this basis, and will have a serious inhibiting effect outside the Sixth Circuit.

2. Review is also warranted to clarify the appropriate First Amendment standard of review applicable to campaign restrictions like the one at issue here, and to clarify the appropriate scope of factual development in such cases.

a. At the outset, it is important to place this issue in the proper framework. The process of selecting candidates for public office is, of necessity, subject to a significant degree of regulation. At the most basic level, the people of a particular state, like the people of the United States as a whole, make precommitments (such as term limits) that could in some sense be understood as limiting political expression. *See generally U.S. Term Limits, Inc. v. Thorton*, 514 U.S. 779, 837 (1995) ("Over half the States have adopted measures that impose such limits on some offices . . . Term limits, like any other qualifications for office unquestionably restrict the ability of voters to vote for whom they wish [but] may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents"). Additionally, States routinely regulate the conditions under which candidates may appear on the ballot, as well as other features of the electoral process. *See generally Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Rosario v. Rockefeller*, 410 U.S. 752, 761-62 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972). Such laws may, of course, implicate First Amendment values because they may have the effect of limiting the ability of individuals or political parties to express their preferences through balloting. Nevertheless, such laws are typically not subject to strict First Amendment scrutiny, and are usually held to be constitutional because they are

understood to further the paramount interest in ensuring that the democratic process works. Strikingly, even laws regulating the electoral process that directly regulate expression because of its consequences, and are thus subject to strict scrutiny, have been upheld by this Court. *See Burson v. Freeman*, 504 U.S. 191 (1992); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). These decisions recognize that governments generally have more latitude to regulate expressive activity in the electoral process than they might in other settings, because the efficacy and integrity of that process is itself an interest of constitutional dimension.

b. Especially in view of this history, First Amendment challenges to campaign finance laws, like all First Amendment challenges, should be governed by the general principle that is now settled (but was not settled at the time of *Buckley*) that "[t]he government's purpose is the controlling consideration" in ascertaining the appropriate First Amendment standard of review. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Strict scrutiny applies only to "regulations enacted for the purpose of restraining speech on the basis of its content." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). The more lenient requirements of intermediate scrutiny apply "to those cases in which the governmental interest is unrelated to the suppression of free expression," *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quotation omitted), or where the legislation is "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quotation omitted); *Ward*, 491 U.S. at 791. This Court recently made clear in *Turner Broadcasting System Inc. v. FCC* that intermediate scrutiny is appropriate even to laws that may directly regulate speech activity, if government's justification for doing so is unrelated to the content of the expression limited by the regulation. 117 S. Ct. at 1197-98. Of course, where a restriction is imposed for the purpose of regulating the

communicative effect of expression occurring in the course of a political campaign, strict First Amendment scrutiny is appropriate, and the law may be upheld only if it advances a compelling interest in the least restrictive manner. Where the government's purpose is unrelated to the communicative impact of the expression at issue, however, a more lenient standard is appropriate.

c. That is plainly the case here. One of the principal rationales offered by the City for its campaign spending limitation is the need to reduce the amount of time elected officials must spend amassing campaign war chests. This justification in no way depends on the communicative impact of any expression that might be curtailed as a result of the law, and is not based in any way on government hostility to the messages expressed by city council candidates. Rather, the Ordinance seeks to limit harmful effects that occur when office holders and candidates must devote enormous amounts of their time to soliciting contributions. In other words, the Ordinance aims at activity related to the generation of income which might then be used to fund speech, and does so not out of any hostility to the speech but out of concern over the effects of the income-generating activity.

The Sixth Circuit, however, applied a standard even stricter than strict scrutiny. It held campaign spending limits could not be justified on any basis -- no matter how compelling. That ruling would appear to be out of accord with this Court's jurisprudence respecting the First Amendment standard of review applicable to content neutral laws. Review is thus warranted to clarify the First Amendment standard of review applicable to government efforts to limit campaign spending in order to achieve goals unrelated to the suppression of expression.

3. Of equal importance, this Court has in recent years substantially clarified the role of district court factual development in resolving First Amendment disputes of the kind at issue here. Even content-neutral justifications such as the one at issue in this case must be supported by something more than speculation. *See Colorado Republican Federal Campaign Committee v. FEC*, 578 U. S. 604, 618 (1996) ("When the government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured") (quotation omitted). By the same token, government must be given the opportunity to meet its burden of proving that the hams it recites are real and will be redressed by the regulation in question. And government may defend a regulation by making a record in court sufficient to support the regulation, even if the judicially developed facts were not considered by the relevant authorities when the Act was passed. That much is now clear from this Court's decisions in the *Turner Broadcasting* cases. In the first *Turner Broadcasting* decision, the Court accepted the theoretical importance of the justification offered by the United States for requiring cable operators to carry the signals of broadcast channels, but remanded to the district court to allow the government to develop a factual record sufficient to show that the harms it recited were real and would be redressed by the law in question. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 668 (1994). When the case returned to this Court, the record developed in the district court provided the principal basis for the Court's conclusion that the government had carried its burden of justifying the must-carry law. Indeed, the Court made clear that the additional evidence on remand was admissible to "support[] the reasonableness of Congress' predictive judgment" that must-carry was necessary. 117 S. Ct. at 1193; *see also id.* at 1191 ("[t]he reasonableness of Congress' conclusion was borne out by the evidence on

remand"). Much of that evidence was not before Congress. Indeed much of it involved actions occurring *after* Congress enacted the law in question.

These principles should apply with full force in the context of adjudicating challenges to campaign finance regulations. Indeed, in *Buckley* itself and in this Court's more recent decision in *Colorado Republican Federal Campaign Committee*, the Court's rejection of the "anti-corruption" rationale for spending limitations at issue in those cases was premised in significant part on the absence of "record evidence or legislative findings" supporting the rationale. *Colorado Republican Federal Campaign Committee*, 518 U.S. at 618. It is all the more important to permit development of a full factual record with respect to the justifications for campaign spending limits that were not even considered by the *Buckley* court.

4. Review is also warranted because readings of *Buckley* such as the one at issue here will stifle reform that is widely perceived as necessary by state and local governments across the nation.

Although *amici* believe *Buckley* should be overruled (or at least significantly modified), it is enough for present purposes to show that the decision is thwarting reforms thought to be necessary at the state and local level. This is an issue of paramount importance. If state and local governments are to be prevented from pursuing campaign finance regulation they believe to be strongly in the public interest -- regulation made necessary by what is widely perceived to be the failure of the regime put in place by the *Buckley* decision -- that should be on the basis of a considered evaluation of First Amendment principles in the context of the practical realities of our present system of electoral campaign finance. Those realities largely

did not exist when *Buckley* was decided, and this Court did not consider them.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Donald B. Verrilli, Jr.*
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

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In The

Supreme Court of the United States

October Term, 1998

CITY OF CINCINNATI; ROXANNE QUALLS, Councilmember and Mayor of the City of Cincinnati; DWIGHT TILLERY, Councilmember; TYRONE YATES, Councilmember; TODD PORTUNE, Councilmember; BOBBIE STERNE, Councilmember; PHILIP M. HEIMLICH, Councilmember; MINETTE J. COOPER, Councilmember; THOMAS A. LUKEN, Councilmember; NICHOLAS J. VEHR, Councilmember; CHARLES WINBURN, Councilmember; JOHN F. SHIREY, City Manager of the City of Cincinnati,

Petitioners,

v.

JOHN R. KRUSE; KRUSE FOR COUNCIL COMMITTEE; THOMAS E. BRINKMAN, JR.; MARK W. MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF THE STATES OF ARIZONA, CONNECTICUT, FLORIDA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WASHINGTON AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

THOMAS J. MILLER
Iowa Attorney General
ELIZABETH M. OSENBAUGH*
**Counsel of Record*
Solicitor General
Hoover Building, 2nd Floor
Des Moines, IA 50319
(515) 281-3349
Counsel for Amici Curiae States

(Additional Counsel On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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GRANT WOODS
Attorney General
State of Arizona

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

JEFFREY A. MODISETT
Attorney General
State of Indiana

CARLA J. STOVALL
Attorney General
State of Kansas

SCOTT HARSHBARGER
Attorney General
State of Massachusetts

FRANK J. KELLEY
Attorney General
State of Michigan

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

JOSEPH P. MAZUREK
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
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Attorney General
State of New Hampshire

TOM UDALL
Attorney General
State of New Mexico

MICHAEL F. EASLEY
Attorney General
State of North Carolina

HEIDI HEITKAMP
Attorney General
State of North Dakota

BETTY D. MONTGOMERY
Attorney General
State of Ohio

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

MARK BARNETT
Attorney General
State of South Dakota

DAN MORALES
Attorney General
State of Texas

JAN GRAHAM
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

QUESTIONS PRESENTED

1. Whether, consistent with this Court's ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), states and municipalities may enact campaign spending limits for their elections upon proof of new facts and circumstances not available nor presented to the *Buckley* Court which establish that compelling governmental interests justify the limits.

2. Whether, if the Court of Appeals for the Sixth Circuit correctly read *Buckley* to hold that all campaign spending limits are *per se* unconstitutional, *Buckley* should now be overruled to permit a showing at trial of new facts and circumstances and new compelling governmental interests which justify such limits.

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INTERESTS OF THE AMICI

The State of Iowa and twenty-five other *amici* States join this brief in support of the petition for certiorari filed by the City of Cincinnati. At issue is whether *Buckley v. Valeo*, 424 U.S. 1 (1976), bars all campaign spending limitations without regard to need or changed circumstances and, if so, whether *Buckley* should be reconsidered and overruled.

The issue is of great significance. Campaign spending has escalated dramatically in the twenty-two years since *Buckley v. Valeo*. Those years have shown that *Buckley* was wrong in predicting that limitations on campaign contributions would be adequate to prevent corruption and the public perception of corruption. Today fundraising to keep up with the spending race dominates the attention of candidates and officials. Television sound bites have replaced comprehensive discussions of issues, and the public is so disenchanted with the electoral process that the percentage of eligible voters exercising the franchise in this country is among the lowest of any advanced democracy.

Representative government depends on public confidence in the electoral system. Public distrust of government because of escalating campaign spending and reports of campaign finance abuse adversely affects all governmental officials. The quality of representation and public acceptance of government are damaged by the attention officials must give to soliciting ever more contributions.

Thirty-four States had enacted campaign spending limitations prior to *Buckley*. Yadlosky, Congressional Research Service, *Analysis of Federal and State Campaign Finance Law*, 22-35, Chart B (1975). That case has since been the basis for invalidation of many state laws and generated countless suits against state and local governments.

The Sixth Circuit's application of *Buckley* to strike locally enacted campaign spending limits in this case effectively bars adoption of campaign spending limitations at any level of government regardless of the offered justification. This Court should grant certiorari in light of the enormous consequences to our system of representative government stemming from this misapplication of *Buckley*.

REASONS FOR GRANTING THE WRIT

The court below held that *Buckley v. Valeo* forever barred campaign spending limits, regardless of whether the States are able to show a compelling interest that cannot be achieved through other means. That cannot be the law. Especially in an issue of such importance, constitutional rules cannot be frozen where they are dependent upon assessments of facts that have changed over time.

Under the decision below, no set of facts could be proved to distinguish *Buckley* or hold it inapplicable due to changed circumstances. App. pp. 19-20. Accordingly, to the extent that *Buckley* held spending limits constitutionally unsupportable, "correction through legislative action is practically impossible." *Payne v. Tennessee*, 501

U.S. 808, 827 (1991), citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

I. THE SIXTH CIRCUIT MISCONSTRUED THIS COURT'S DECISION IN *BUCKLEY v. VALEO* AS PRECLUDING JUDICIAL RECOGNITION OF COMPELLING GOVERNMENTAL INTERESTS SUFFICIENT TO JUSTIFY CAMPAIGN EXPENDITURE LIMITATIONS.

Buckley assumed that the "major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions." *Buckley v. Valeo*, 424 U.S. at 55. The Court then reasoned that "[t]he interest in alleviating the corrupting influence of large contributions" was served by FECA's contribution restrictions and disclosure requirements. The Court therefore concluded, on the record before it, that limitations on overall expenditures were unnecessary. *Id.* *Buckley* did not decide that the Constitution directly prohibits spending limitations. Instead, based upon the limited record before it, the Court found that spending limitations were not necessary to accomplish the compelling State interest of "alleviating the corrupting influence of large contributors" because alternative measures would suffice. 424 U.S. at 58. *Buckley* did not foreclose proof of new or changed facts and circumstances to support the enactment of campaign spending limitations.

A. Cincinnati offered proof of facts and circumstances supporting the City Council's legislative determination that campaign expenditure limitations were necessary to serve compelling governmental interests.

The record in this case fully supports the City Council's legislative judgment that excessive campaign spending undermines the public's confidence in the city's electoral process and in its elected officials. *Buckley* recognized that reduction of the appearance of corruption is a compelling state interest in order to protect public confidence in the system – surely a prerequisite to democratic government. The diversion of candidates' and officials' time and attention to fundraising, rather than the issues of governing, undermines public confidence, as does the perception that qualified persons cannot win unless they have access to significant wealth.

1. Campaign expenditures have risen dramatically since issuance of the *Buckley* decision.

Justice White's dissent in *Buckley* predicted that campaign spending would inevitably escalate in the absence of spending limitations. 424 U.S. at 264. Experience has proven Justice White's prediction true. Campaign spending has dramatically escalated since 1976.

The City of Cincinnati's experience shows the escalation of campaign spending at the local level. From 1987 to 1995 total campaign spending for City Council rose from $958,000 to $2.33 million while the number of candidates

declined from 25 to 18. R. No. 38, Statement of Facts, ¶ 1.[1] By 1995, political contributions by average voters had become only a marginal factor in Cincinnati City Council campaign spending. In 1995, contributions of less than $100 constituted only 5.6 percent of total spending. R. No. 38, Exh. 1, ¶ 4; Exh. 3, Makinson Aff., ¶ 10. Only 5,949 persons (one third of one percent of the 1.8 million people in the Cincinnati metropolitan area) donated over $100 in any City Council campaign from 1991 to 1995. R. No. 38, Exh. 1, ¶ 8; Exh. 3, ¶ 14.

Spending also escalated at the federal level. Spending in United States Senate races increased almost nine fold from 1976 to 1996 (from $38 million to $341 million). The average cost of a Senate campaign increased from $610,000 in 1976 to $4.7 million in 1996 – requiring an average Senator or Senate candidate to raise $15,000 in contributions for every week of a six-year term. Total campaign spending for the U.S. House of Representatives climbed from $60.9 million in 1976 to $499 million in 1996. The average winning campaign cost for a congressional seat jumped from $87,280 in 1976 to $673,000 in 1996. Ninety-four House candidates spent more than one million dollars each in 1996; six spent two million dollars or more. Center for Responsive Politics, "The Big Picture: Where the Money Came From in the 1996 Elections" (1997) [www.crp.org]; Wertheimer and Manes, "Campaign Finance Reform: A Key to Restoring the Health of Our Democracy," 94 Colum. L. Rev. 1126, 1132.

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[1] The full record in the District Court will be referred to as "R." Affidavits will be cited as "Aff."

2. Escalating campaign spending has significantly damaged public confidence in the electoral system.

Excessive campaign spending undermines public confidence in the electoral process and in elected officials. The Cincinnati League of Women Voters conducted a two-year study of campaign finance reform which concluded:

> Voters often perceive the high level of campaign expenditures as buying an office and of the officeholder's need, therefore to pay special attention to large contributors and their interests.
>
> Citizens are exercising less frequently their right and responsibility to vote because of disenchantment with the way the current system operates.

R. No. 38, Exh. 1. The record also establishes a public perception in Cincinnati that officeholders must pay special attention to large contributors in order to raise adequate funds for the next election. R. No. 38, Exh. 1, ¶ 23, citing League of Women Voters Study attached to Exh. 6; Deardorff Aff., Exh. 4, ¶ 7; Sterne Aff., Exh. 7, ¶ 28.

Buckley assumed that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. Escalated campaign spending has not, however, resulted in more issues discussed in greater depth. To the contrary, the record below showed that candidates developed large war chests for

the purpose of, and effectively used them to, freeze other candidates out of races by buying up available television advertising time. R. No. 38, Statement of Facts, ¶ 13; R. No. 37, Galvin Aff. *See also* Wertheimer and Manes, 94 Colum. L. Rev. at 1133. Nationally, increased spending has directly resulted in increased reliance on television commercials, rather than on expanding the "marketplace of ideas." *See* Roland S. Homet, Jr., "Fact-Finding in First Amendment Litigation: The Case of Campaign Finance Reform," 21 Okla. City. U. L. Rev. 97, 121 (1996).

Unlimited campaign spending undermines representative government by discouraging qualified persons from running for office. The lack of any limits on campaign spending threatens to turn elective office into a rich person's game. The undisputed Statement of Facts, R. No. 38, Exh. 1, ¶ 13, establishes that the high cost of running for city council discourages qualified persons from running and thus limits the choice of voters. See R. No. 38, Smith Aff., Exh. 11, ¶ 8.

Buckley wrongly dismissed the finding of the court of appeals that spending limits were necessary to prevent circumvention of contribution limits as "not persuasive." 424 U.S. at 55. The absence of campaign spending limitations has made it possible for candidates and contributors to develop many means to circumvent contribution limitations. The high cost of winning campaigns places enormous pressure on candidates to raise funds. "This means, in turn, that those who seek influence through this system of unlimited spending will often contribute money in ways which undercut the anticorruption purpose of the contribution limitations." Raskin & Bonifaz, "Equal Protection and the Wealth Primary," 11 Yale L. & Pol'y Rev.

273, 326 (1993). An example is the practice of "bundling" individual contributions so that contributions from related entities are collected by one entity and provided to the campaign, thus evading contribution limitations while increasing the influence of the contributor. *Id.* at 326-327.

After *Buckley*, this Court recognized that States have a compelling interest to prevent the "corrosive and distorting effects" of large aggregations of corporate wealth on elections. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), this Court upheld a limitation on independent corporate spending in elections. The Court found that the limitations furthered a compelling interest not in eliminating "financial quid pro quo" corruption, but in reducing "a different type of corruption in the political arena: the corrosive and distorting effects [upon the election process] of immense aggregation of wealth that are accumulated with the help of the corporate form. . . . " *Id.* at 660. *See also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207-208 (1982) (acknowledging legitimate interest in "ensuring that substantial aggregations of wealth amassed by the special advantage of the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions"); *U.S. v. International Union*, 352 U.S. 567, 585 (1957) (interpreting the prohibition upon corporate and labor organization contributions in connection with federal elections in a manner consistent with "the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of

money by those who exercise control over large aggregations of capital").

This Court has also identified preservation of a stable political process as a critical state interest – in that all our democratic institutions are based upon acceptance by the governed. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), this Court upheld a "fusion" ban on candidates appearing on the ballot for more than one party. The Court recognized the State of Minnesota's "strong interest" in the stability of its political system, permitting reasonable election regulation, even to the extent of favoring a two-party system. 520 U.S. at 361.

3. The fundraising demands resulting from unlimited campaign spending impede the ability of candidates and elected officials to devote sufficient time to discussion of substantive issues and performance of official duties.

The staggering cost of political campaigns today means that fund-raising commands a significant amount of the time of elected officials and candidates. So long as there is no cap, all candidates have an incentive to spend more than their opponents. The result is that the President, Governors, and elected officials at all levels are diverted from their official duties and focus instead on fund-raising. The nature of incessant fund-raising also raises concern that those who give will command the officials' attention rather than the public at large. Escalating campaign spending and concomitant fundraising thus also affect the quality of representation by officials.

That raising large amounts of campaign funding can adversely affect performance of official duties and public perception thereof is also apparent in the judicial campaign context. Given the increasingly expensive nature of elections, judges must seek substantial campaign contributions, often from litigants and lawyers with business before the judge at issue. Scott D. Weiner, "Popular Justice: State Judicial Elections and Procedural Due Process," 31 Harv. Civ. R.-Civ. L. L. Rev. 187, 196 (1996). Favoritism toward litigants directly contradicts the very function of the judge and the constitutional requirements of due process. *See Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972). Yet the Court of Appeals for the Sixth Circuit has held that *Buckley* precludes limitations on judicial campaign spending as well. *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (petition for certiorari due October 28).

The impact on official time is most obvious at the federal level.[2] Senators must raise an average of $15,000 per week to remain competitive; representatives need $6500 per week. The incumbent President, Vice-President, and Speaker of the House have all been the target of investigations and threats of investigations for alleged

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[2] The decision below wrongly held that federal experience was irrelevant to the City's argument that there were compelling governmental interests to support its limitations on campaign spending. App. p. 20. It is ironic that the failure of the federal government to adequately defend federal campaign spending limitations in *Buckley* precluded States from putting caps on campaign expenditures but now federal courts say local governments cannot point to the federal experience to defend spending limits.

campaign finance abuses. H.R. Rep. No. 1, 105th Cong., January 17, 1997; S. Rep. No. 167, 105th Cong., 1998.

States have a compelling interest in assuring that the demands of fundraising not drain elected officials of the time and attention necessary to carry out their official duties. Blasi, "Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All," 94 Colum. L.Rev. 1281, 1284-1289 (1994). The increased time spent raising campaign funds is directly related to the high level of campaign spending. Alternative campaign finance reform methods, such as contribution limits and disclosure requirements, do not prevent this diversion of time and attention. "Candidates facing or fearing tight races will be preoccupied with fund-raising (or voucher raising) under any system that does not restrict total spending." *Id.* at 1284. This harm is clearly not caused by speech, but by the process of collecting campaign dollars. Nor can the impact on candidates' time be mitigated by more speech. *Id.* at 1298-99.

The City of Cincinnati offered evidence to establish that the campaign expenditure limitations were necessary to free candidates and office-holders from the inordinate amount of time and attention which must be devoted to fundraising. The decision below wrongly applied *Buckley* to foreclose judicial recognition of these governmental interests, concluding that government simply "cannot constitutionally limit the cost of campaigns. . . . " App. p. 22.

As the concurring panel member recognized, this aspect of the decision below is in conflict with the rationale of decisions of the Courts of Appeals for the First and Eighth Circuits, upholding voluntary expenditure limits within a public financing system. App. pp. 29-30. Those decisions recognized an independent compelling governmental interest in freeing candidates from the rigors of fundraising. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996), *cert. denied* ___ U.S. ___, 117 S. Ct. 1820 (1997); *Vote Choice Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). The Court of Appeals for the Eighth Circuit, in upholding the voluntary expenditure limitations in Minnesota's public financing system, found as a matter of "well settled" law the government's compelling interest in seeking "a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning." *Rosenstiel*, 101 F.3d at 1553, *citing Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1426 (8th Cir. 1995); *Republican Nat'l Committee v. FEC*, 487 F. Supp. 280, 285 (S.D.N.Y) (three-judge court), *aff'd mem.* 445 U.S. 955 (1980); *but see Russell v. Burris*, 146 F.3d 563, 568 (8th Cir. 1998) (indicating that the anti-corruption rationale is only compelling interest thus far recognized by this Court to support campaign spending limits). The Court of Appeals for the First Circuit, in upholding portions of the Rhode Island public financing system, acknowledged that "the state possesses a valid interest in having candidates accept public financing because such programs . . . free candidates from the pressures of fundraising." *Vote Choice Inc. v. DiStefano*, 4 F.3d at 39.

This Court has long recognized a strong public interest in avoiding the distraction of officials from their governmental duties. *Crawford-El v. Britton*, 118 S. Ct. 1584, 1592-93 (1998) (qualified immunity from official capacity suits); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (public concern with cost of subjecting officials to risk of trial); *Imbler v. Pachtman*, 424 U.S. 409, 416 (1976) (prosecutorial immunity). The immunity cases recognize that it is important not only to prevent the risk of monetary liability but also to protect officials' time and ability to carry out the duties they were elected to perform. *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (immunity also protects from pretrial burdens such as discovery).

"It is quite wrong to assume that the net effect of limits on contributions and expenditures – which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment." *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 116 S. Ct. 2309, 2332 (1996) (Stevens and Ginsberg, J., dissenting).

B. *Buckley* does not preclude judicial recognition of compelling governmental interests sufficient to justify spending limitations.

Perhaps because this Court in *Buckley* considered only an abstract challenge to campaign spending limitations and the United States did not defend those, the Court found that "no governmental interest that has been

suggested is sufficient to justify the restriction on the quantity of political expression imposed by 608(c)'s campaign expenditure limitations." 424 U.S. at 55. As shown above, there are a variety of interests that are implicated by campaign spending limits and the City should have been permitted to prove these interests at trial.[3]

The Court's factual assumptions in *Buckley* cannot permanently preclude courts from hearing evidence that those facts are in error or from hearing new factual matters to support campaign spending limitations. "[A] decision of the Court, if, in essence, merely the determination of a fact, is not entitled in later controversies between other parties, to that sanction which, under the policy of *stare decisis*, is accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have

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[3] Kruse attacked the facial constitutionality of Cincinnati Ordinance 240-1995, arguing that no set of facts could be proven to support the ordinance. The district court granted summary judgment, concluding that *Buckley* was controlling in its conclusion that campaign expenditure limits are unconstitutional. App. p. 47. The Court of Appeals, while acknowledging Kruse's agreement to stipulate to any and all facts set forth by the City in defense of the ordinance, affirmed the award of summary judgment, concluding that no new governmental interests beyond those rejected in *Buckley* were offered by the City. App. pp. 3, 28. In a concurring opinion, Judge Cohn disagreed, indicating that issues of new compelling interests had been legitimately raised, but concluding that "although the City here attempted to develop a compelling factual record, it failed to do so." App. p. 29.

changed meanwhile." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1931) (Brandeis, J. dissenting).

Where less restrictive alternatives fail to accomplish the compelling state interest, *stare decisis* does not preclude a State from enacting more burdensome laws necessary to meet the need. *See Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364, 401 n.27 (1984) describing *CSC v. Letter Carriers*, 413 U.S. 548, 557-563 (1973) ("over a century of governmental experience with less restrictive alternatives that proved to be inadequate to maintain the effective operation of government" supported constitutionality of Hatch Act).

Changed factual circumstances provide an appropriate basis for distinguishing a decision of the Supreme Court. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) ("a precedent becomes more vulnerable as it becomes outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare' "), *quoting Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, concurring). Overruling a prior case is appropriate where "facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification. . . . " *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

II. THERE IS SUFFICIENT DOUBT REGARDING THE SOUNDNESS OF *BUCKLEY* TO MERIT RECONSIDERATION OF THAT DECISION.

To the extent that the Sixth Circuit correctly applied *Buckley* to hold all campaign spending limits unconstitutional, reconsideration of *Buckley* is appropriate.

Significant doubt about the soundness of the decision in *Buckley* and the strength of criticism of that decision among legal scholars[4] supports reconsideration. *See Afroyim v. Rusk*, 387 U.S. 253, 255-56 (1967); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-49 (1977).

It is particularly inappropriate to read *Buckley* as conclusively adjudicating issues of legislative fact as there was never a trial in *Buckley*. That 144-page *per curiam* decision was an advisory opinion, decided at the invitation of Congress in a manner contrary to basic principles of constitutional adjudication. Homet, 21 Okla.City U. L.Rev. at 99-107. Congress authorized any voter to seek a declaratory judgment to construe the constitutionality of the act.[5] *Buckley v. Valeo*, 519 F.2d 821, 834, n.7 (D.C. Cir. 1975). Indeed, no one could have been injured by the act as the case was filed on January 2, 1975, the first business day after the law took effect. The case was rushed to judgment because Congress so ordered.

The *per curiam* decisions of the court of appeals and this Court were based on stipulations and offers of proof

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[4] Among critical analyses of *Buckley* are: C. Edwin Baker, *"Campaign Expenditures and Free Speech,"* 33 Harv. C.R.-C.L.L.Rev. 1 (1998); Peter M. Shane, *Commentary, Back to the Future of the American State: Overruling Buckley v. Valeo and Other Madisonian Steps*, 57 U. Pitt. L. Rev. 443 (Winter 1996); Roland S. Homet, Jr., "Fact-Finding in First Amendment Litigation: The Case of Campaign Finance Reform," 21 Okla. City. U. L. Rev. 97 (1996).

[5] The *Buckley* decision summarily disposed of the case and controversy issue by stating that "at least some of the appellants" had a sufficient stake to present a real controversy. 424 U.S. at 12.

concerning 28 certified questions of constitutional law. *Buckley*, 519 F.2d 901-904. These certified questions were abstract and hypothetical, such as the question on the constitutionality of spending limits:

> 3. Does any statutory limitation, or do the particular limitations in the challenged statutes, on the amounts that individuals or organizations may contribute or expend in connection with elections for federal office violate the rights of one or more of the plaintiffs under the First, Fifth, or Ninth Amendment or the Due Process Clause of the Fifth Amendment of the Constitution of the United States?

519 F.2d at 899.

The United States did not defend the constitutionality of the spending limits. The Brief for the Attorney General as Appellee and for the United States as Amicus Curiae, pp. 67-68, 72-73, indeed suggested that expenditure limitations might be unconstitutional.

Even in First Amendment cases, the Court accords deference to legislative findings as to harms to be avoided and the remedial measures to be adopted; otherwise, the legislative authority to make judgments to develop national policy would be greatly infringed. *Turner Broadcasting System, Inc., v. Federal Communications Commission*, 520 U.S. 180, 195 (1997) (upholding cable television "must-carry" requirements). Despite the lack of any trial of fact, the decision in *Buckley* gave no deference to legislative judgments as to the need for spending limitations. As Justice White noted in dissent, "The record

before us no more supports the conclusion that the communicative efforts of congressional and Presidential candidates will be crippled by the expenditure limitations than it supports the contrary." 424 U.S. at 263.

The results of two decades of application of *Buckley* lend credence to the legislative findings rejected therein and provide a basis for new legislative findings of compelling governmental interests necessitating campaign expenditure limitations.

CONCLUSION

The *amici* States urge this Court to reevaluate campaign expenditure limits in light of the facts and compelling interests presented in this case which were not raised in *Buckley*. We submit that *Buckley* does not and should not stand as a bar to Cincinnati's campaign expenditure limits and request the Court to reverse the decision below which struck down the ordinance as unconstitutional.

Respectfully submitted,

THOMAS J. MILLER
Iowa Attorney General
ELIZABETH M. OSENBAUGH*
*Counsel of Record
Solicitor General
Hoover Building, 2nd Floor
Des Moines, IA 50319
(515) 281-3349
Counsel for Amici Curiae States

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF CINCINNATI, *et al.*,
Petitioners,

v.

JOHN R. KRUSE, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE SECRETARIES OF STATE OF CONNECTICUT, GEORGIA, MAINE, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, WEST VIRGINIA AND WISCONSIN, THE EXECUTIVE DIRECTOR OF CAMPAIGN SPENDING COMMITTEE OF HAWAII, THE DIRECTOR OF THE REGISTRY OF ELECTION FINANCE OF KENTUCKY, AND THE EXECUTIVE DIRECTOR OF ETHICS COMMISSION OF OKLAHOMA IN SUPPORT OF THE PETITIONERS

Donald B. Verrilli, Jr.*
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

October 19, 1998

**Counsel of Record*

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INTEREST OF AMICI

Amici include the following Secretaries of State: Miles Rapoport of Connecticut, Lewis Massey of Georgia, Dan Gwadosky of Maine, William Galvin of Massachusetts, Joan Growe of Minnesota, Eric Clark of Mississippi, Mike Cooney of Montana, Dean Heller of Nevada, William Gardner of New Hampshire, Stephanie Gonzales of New Mexico, James R. Langevin of Rhode Island, Jim Miles of South Carolina, Riley Darnell of Tennessee, Ken Hechler of West Virginia and Douglas LaFollette of Wisconsin.[1] *Amici* also include: Robert Watada, Executive Director of Campaign Spending Committee of Hawaii, George Russell, Director of Registry of Election Finances of Kentucky, and Marilyn Hughes, Executive Director of Ethics Commission of Oklahoma. In these positions, they serve as chief election officers in their States. They thus have considerable experience with the issues raised in this case, and in particular have witnessed the serious threats that unlimited campaign spending poses to the integrity and health of the political process.

Amici seek review of the Sixth Circuit's decision in this case because they believe this Court should re-evaluate the principles of *Buckley v. Valeo*, 424 U.S. 1 (1976), in light of the practical realities of the campaign finance system that has evolved in this nation in the past quarter century. A number of States and localities have enacted campaign finance regulations similar to the one at issue here, based on their belief that such regulations are necessary to preserve the health of our democratic form of government, and to combat widespread public cynicism about the extent to which office holders and

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1/The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity made a financial contribution to the preparation or submission of this brief.

candidates must focus on the never ending process of garnering contributions, rather than on the process of governing itself. Many more States and localities would doubtless enact legislation similar to that at issue here if the perceived constraints of the *Buckley* decision were removed.

These initiatives respond to practical realities. Office holders and candidates do in fact have to spent ever increasing amounts of time raising funds. Their preoccupation with fundraising does in fact diminish their ability to fulfill their responsibilities as elected officials. Additionally, contribution limits (the only form of campaign finance regulation approved in *Buckley*) are so now routinely circumvented (through a variety of stratagems) that those limitations are no longer effective in preventing both the actuality and appearance of *quid pro quo* corruption of the political process. *Buckley v. Valeo* needs to be reconsidered in light of these practical realities.

STATEMENT

This case involves an ordinance passed by the City of Cincinnati in 1995 limiting overall expenditures for City Council campaigns to $140,000.[2/] The City enacted this limitation to address widespread loss of public confidence in the electoral process and in local government, a loss of confidence brought about by the unlimited campaign spending that characterized City elections. In particular, the City sought to combat the risk of actual *quid pro quo* corruption as well as its appearance, to free office holders from the ever increasing pressures of fundraising made necessary by the absence of

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2/City of Cincinnati Ordinance No. 336-1995, amended by Ordinance No. 9-1997.

limits on overall campaign spending, and for other purposes. The relevant facts related to the City's decision to limit overall campaign spending, and to the justifications for imposing that limitation, are fully set forth in the petition for certiorari and will not be repeated here.

For present purposes, it suffices to note that the City of Cincinnati is not alone in its perception that unlimited campaign spending threatens the health of our democratic institutions. Last year, the State of Vermont enacted campaign spending limits for its state elections, which will take effect in the year 2000. *See* Vt. Stat. Ann. tit. 17, § 2805a. The City of Albuquerque, New Mexico has enacted limitations on campaign spending for local elections. *See* Albuquerque, New Mexico Charter, art. XIII, Election Code § 4. The Supreme Court of Ohio revised its judicial ethics code to limit campaign spending for judicial elections. *See* Supreme Court of Ohio Code of Judicial Conduct, Cannon VII(C)(6). Many other States and localities are contemplating similar restrictions. These state and local initiatives respond to a growing perception that our electoral processes are coming to threaten the health of our democratic institutions.

REASONS FOR GRANTING THE PETITION

The petition for certiorari should be granted because there is a pressing need for re-examination of *Buckley v. Valeo*. That is so for four related reasons. First, campaign spending limitations of the kind at issue in this case can be (and in fact are) justified on the basis of content-neutral reasons that were never considered in *Buckley*, and should be considered by this Court now. Second, the First Amendment standard of review applicable to such content-neutral regulations has been clarified considerably in the decades since *Buckley* was decided, *see Turner Broadcasting System, Inc. v. FCC*, 117 S.

Ct. 1174, 1183, 1186-87 (1997), in ways that cast significant doubt on *Buckley's* method of analysis and ultimate result respecting campaign spending limitations. Third, the Court of Appeals' decision to deny the City any meaningful opportunity to develop a record to support its campaign spending limitations cannot be reconciled with this Court's recent decisions making clear that government is entitled to an opportunity to prove in court that the harms it seeks to address are real, and not merely speculative. Fourth, the *Buckley* decision stands as a significant barrier to reforms of the political process that are widely perceived as necessary to the health of our democratic system of government at the state and local (as well as the federal) level.

1. The campaign spending limitation struck down by the Sixth Circuit in this case serves important public interests that differ in critical respects from those evaluated by the Court in *Buckley*. The Sixth Circuit focused most of its analysis on only one of the justifications offered by the City; the need to combat risks of actual and perceived corruption of the political process. We believe the Sixth Circuit erred by assuming that *Buckley* foreclosed this justification, notwithstanding that the City had put forward a far more compelling factual showing in support of this justification than was available to the *Buckley* Court. *See* page 9, *infra*. But the City also advanced other justifications that were never considered by the *Buckley* court. Most importantly, the City enacted overall spending limitations in order to free council members and candidates from the enormously time consuming burden of perpetual fund raising that the prior system of unlimited campaign expenditures made necessary. That is a compelling interest in its own right, and provides an independent justification for campaign spending limitations.

a. The interest asserted by the City in defense of its campaign spending limits is, in essence, an interest in the quality of representation. The City seeks to eliminate the enormous burden of raising large campaign war chests. That this burden exists, and has come to dominate the professional lives of office holders and candidates is not open to serious question. *See* Petition for Certiorari at 11-14. *See generally* Vincent A. Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281-82 & nn.1-3 (1994). The problem the Ordinance at issue here addresses is that the incessant demands of fund raising effectively prevent elected representatives from fulfilling their professional duties. Elected officials spend so much of their time raising campaign funds that they do not have enough time remaining to master issues, communicate with constituents, hold hearings, or perform other essential parts of their job. This interest is not merely important; it is of constitutional dimension in its own right.

This problem is the direct result of the absence of overall limits on campaign spending, and will be addressed by such limits. Moreover, the fundraising burden on candidates is an outgrowth of the campaign finance regime that *Buckley* generated. By upholding limits on campaign contributions and coordinated expenditures while striking down campaign spending limits, the *Buckley* court established a legal structure that puts States and localities to an unpalatable choice. If they address the risks of corruption by imposing contribution limits, they force officeholders and candidates to spend most of their time raising campaign funds (because the huge aggregate funds needed to campaign effectively may only be raised in small increments). If they decide to free office holders and candidates from this burden by eliminating contribution limits,

they must endure the risk of actual and perceived corruption of the electoral process.

b. The Sixth Circuit believed that *Buckley* foreclosed consideration of this justification for overall spending limits. That is not correct. The justifications considered and rejected by the *Buckley* Court have almost nothing to do with the problem of how candidates spend their time. The *Buckley* Court rejected the argument that Congress could decide that campaign spending had become wasteful or excessive. The *Buckley* Court also held that the record presented in that case did not support the argument that overall spending limits were needed as an additional means to promote compliance with contribution limits. 424 U.S. at 56. The *Buckley* Court simply did not consider the candidate time-protection rationale the City offers here.

According to the Court of Appeals, that rationale was nevertheless foreclosed because the "need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns." Pet. App. 22a. The court reasoned that "because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money . . . cannot serve as a basis for limiting campaign spending." *Id.* But that puts the cart before the horse. The *question* before the Sixth Circuit was whether the candidate protection rationale provided an alternative basis sufficient to justify overall campaign spending limits. *Buckley* would foreclose that rationale only if *no* rationale was sufficient to justify such restrictions. We do not read *Buckley* as foreclosing any possibility of justifying campaign spending limits. At a minimum, however, the Sixth Circuit's holding makes clear the need for guidance from this Court as to whether such restrictions may be imposed under appropriate circumstances. Otherwise, the Sixth Circuit's ruling will effectively prohibit States and other localities within

the Circuit from enacting campaign spending limits justified on this basis, and will have a serious inhibiting effect outside the Sixth Circuit.

2. Review is also warranted to clarify the appropriate First Amendment standard of review applicable to campaign restrictions like the one at issue here, and to clarify the appropriate scope of factual development in such cases.

a. At the outset, it is important to place this issue in the proper framework. The process of selecting candidates for public office is, of necessity, subject to a significant degree of regulation. At the most basic level, the people of a particular state, like the people of the United States as a whole, make precommitments (such as term limits) that could in some sense be understood as limiting political expression. *See generally U.S. Term Limits, Inc. v. Thorton*, 514 U.S. 779, 837 (1995) ("Over half the States have adopted measures that impose such limits on some offices . . . Term limits, like any other qualifications for office unquestionably restrict the ability of voters to vote for whom they wish [but] may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents"). Additionally, States routinely regulate the conditions under which candidates may appear on the ballot, as well as other features of the electoral process. *See generally Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Rosario v. Rockefeller*, 410 U.S. 752, 761-62 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972). Such laws may, of course, implicate First Amendment values because they may have the effect of limiting the ability of individuals or political parties to express their preferences through balloting. Nevertheless, such laws are typically not subject to strict First Amendment scrutiny, and are usually held to be constitutional because they are

understood to further the paramount interest in ensuring that the democratic process works. Strikingly, even laws regulating the electoral process that directly regulate expression because of its consequences, and are thus subject to strict scrutiny, have been upheld by this Court. *See Burson v. Freeman*, 504 U.S. 191 (1992); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). These decisions recognize that governments generally have more latitude to regulate expressive activity in the electoral process than they might in other settings, because the efficacy and integrity of that process is itself an interest of constitutional dimension.

b. Especially in view of this history, First Amendment challenges to campaign finance laws, like all First Amendment challenges, should be governed by the general principle that is now settled (but was not settled at the time of *Buckley*) that "[t]he government's purpose is the controlling consideration" in ascertaining the appropriate First Amendment standard of review. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Strict scrutiny applies only to "regulations enacted for the purpose of restraining speech on the basis of its content." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). The more lenient requirements of intermediate scrutiny apply "to those cases in which the governmental interest is unrelated to the suppression of free expression," *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quotation omitted), or where the legislation is "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quotation omitted); *Ward*, 491 U.S. at 791. This Court recently made clear in *Turner Broadcasting System Inc. v. FCC* that intermediate scrutiny is appropriate even to laws that may directly regulate speech activity, if government's justification for doing so is unrelated to the content of the expression limited by the regulation. 117 S. Ct. at 1197-98. Of course, where a restriction is imposed for the purpose of regulating the

communicative effect of expression occurring in the course of a political campaign, strict First Amendment scrutiny is appropriate, and the law may be upheld only if it advances a compelling interest in the least restrictive manner. Where the government's purpose is unrelated to the communicative impact of the expression at issue, however, a more lenient standard is appropriate.

c. That is plainly the case here. One of the principal rationales offered by the City for its campaign spending limitation is the need to reduce the amount of time elected officials must spend amassing campaign war chests. This justification in no way depends on the communicative impact of any expression that might be curtailed as a result of the law, and is not based in any way on government hostility to the messages expressed by city council candidates. Rather, the Ordinance seeks to limit harmful effects that occur when office holders and candidates must devote enormous amounts of their time to soliciting contributions. In other words, the Ordinance aims at activity related to the generation of income which might then be used to fund speech, and does so not out of any hostility to the speech but out of concern over the effects of the income-generating activity.

The Sixth Circuit, however, applied a standard even stricter than strict scrutiny. It held campaign spending limits could not be justified on any basis -- no matter how compelling. That ruling would appear to be out of accord with this Court's jurisprudence respecting the First Amendment standard of review applicable to content neutral laws. Review is thus warranted to clarify the First Amendment standard of review applicable to government efforts to limit campaign spending in order to achieve goals unrelated to the suppression of expression.

3. Of equal importance, this Court has in recent years substantially clarified the role of district court factual development in resolving First Amendment disputes of the kind at issue here. Even content-neutral justifications such as the one at issue in this case must be supported by something more than speculation. *See Colorado Republican Federal Campaign Committee v. FEC*, 578 U. S. 604, 618 (1996) ("When the government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured") (quotation omitted). By the same token, government must be given the opportunity to meet its burden of proving that the hams it recites are real and will be redressed by the regulation in question. And government may defend a regulation by making a record in court sufficient to support the regulation, even if the judicially developed facts were not considered by the relevant authorities when the Act was passed. That much is now clear from this Court's decisions in the *Turner Broadcasting* cases. In the first *Turner Broadcasting* decision, the Court accepted the theoretical importance of the justification offered by the United States for requiring cable operators to carry the signals of broadcast channels, but remanded to the district court to allow the government to develop a factual record sufficient to show that the harms it recited were real and would be redressed by the law in question. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 668 (1994). When the case returned to this Court, the record developed in the district court provided the principal basis for the Court's conclusion that the government had carried its burden of justifying the must-carry law. Indeed, the Court made clear that the additional evidence on remand was admissible to "support[] the reasonableness of Congress' predictive judgment" that must-carry was necessary. 117 S. Ct. at 1193; *see also id.* at 1191 ("[t]he reasonableness of Congress' conclusion was borne out by the evidence on

remand"). Much of that evidence was not before Congress. Indeed much of it involved actions occurring *after* Congress enacted the law in question.

These principles should apply with full force in the context of adjudicating challenges to campaign finance regulations. Indeed, in *Buckley* itself and in this Court's more recent decision in *Colorado Republican Federal Campaign Committee*, the Court's rejection of the "anti-corruption" rationale for spending limitations at issue in those cases was premised in significant part on the absence of "record evidence or legislative findings" supporting the rationale. *Colorado Republican Federal Campaign Committee*, 518 U.S. at 618. It is all the more important to permit development of a full factual record with respect to the justifications for campaign spending limits that were not even considered by the *Buckley* court.

4. Review is also warranted because readings of *Buckley* such as the one at issue here will stifle reform that is widely perceived as necessary by state and local governments across the nation.

Although *amici* believe *Buckley* should be overruled (or at least significantly modified), it is enough for present purposes to show that the decision is thwarting reforms thought to be necessary at the state and local level. This is an issue of paramount importance. If state and local governments are to be prevented from pursuing campaign finance regulation they believe to be strongly in the public interest -- regulation made necessary by what is widely perceived to be the failure of the regime put in place by the *Buckley* decision -- that should be on the basis of a considered evaluation of First Amendment principles in the context of the practical realities of our present system of electoral campaign finance. Those realities largely

did not exist when *Buckley* was decided, and this Court did not consider them.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Donald B. Verrilli, Jr.*
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

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In The

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CITY OF CINCINNATI; ROXANNE QUALLS, Councilmember and Mayor of the City of Cincinnati; DWIGHT TILLERY, Councilmember; TYRONE YATES, Councilmember; TODD PORTUNE, Councilmember; BOBBIE STERNE, Councilmember; PHILIP M. HEIMLICH, Councilmember; MINETTE J. COOPER, Councilmember; THOMAS A. LUKEN, Councilmember; NICHOLAS J. VEHR, Councilmember; CHARLES WINBURN, Councilmember; JOHN F. SHIREY, City Manager of the City of Cincinnati,

Petitioners,

v.

JOHN R. KRUSE; KRUSE FOR COUNCIL COMMITTEE; THOMAS E. BRINKMAN, JR.; MARK W. MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITIONERS

JOHN C. BONIFAZ
Counsel of Record
BRENDA WRIGHT
GREGORY G. LUKE
NATIONAL VOTING RIGHTS INSTITUTE
294 Washington Street
Suite 713
Boston, Massachusetts 02108
(617) 368-9100 Phone
(617) 368-9101 Fax

FAY D. DUPUIS
City Solicitor
KARL P. KADON, III
Deputy City Solicitor
The City of Cincinnati
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3333 Phone
(513) 352-1515 Fax

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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As stated in the petition, in the *amici* briefs of twenty-six states and eighteen secretaries of state or chief elections officers, and in this reply, certiorari is appropriate in this case to correct the Sixth Circuit's decision in conflict with this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976). In the alternative, if the Sixth Circuit's ruling is consistent with *Buckley*, certiorari is appropriate to reconsider *Buckley* in light of new facts and circumstances associated with unlimited campaign spending.

I. THE CONFLICT WITH *BUCKLEY* WARRANTS REVIEW OF THE SIXTH CIRCUIT'S DECISION.

Respondents' claims notwithstanding, this Court did not hold in *Buckley* that all campaign spending limits – regardless of the facts and circumstances – are *per se* unconstitutional. It held that "[n]o governmental interest *that [had] been suggested* [was] sufficient to justify [the congressional campaign spending limits]." *Buckley*, 424 U.S. at 55 (emphasis added). It further held, based on the facts presented, that contribution limits alone were sufficient to address the compelling governmental interests of preventing corruption and the appearance of corruption, and that, therefore, campaign spending limits were unnecessary to address such interests. *Id.* at 55-56.

Respondents now attempt to shift attention from this core issue by contending that the factual record and compelling governmental interests presented in this case, at this summary judgment stage, matches the factual record and compelling governmental interests presented to this Court in *Buckley*. A fair reading of the record here reveals that Cincinnati has presented new interests and new facts unavailable to the *Buckley* Court which demonstrate the necessity for campaign spending limits in its local elections. The Sixth Circuit's ruling foreclosing the

consideration of these new interests and new facts endangers the ability of state and local governments to address serious threats to their democratic processes resulting from unlimited campaign spending.

A. The Sixth Circuit Did Not Weigh The Facts Presented in this Record.

Respondents repeatedly assert that the Sixth Circuit fully considered all of the facts in the record and the new and compelling governmental interests which Cincinnati presented to justify its campaign spending limits. The Sixth Circuit's ruling, however, is based on the premise that, according to *Buckley*, all campaign spending limits are *per se* unconstitutional. App. 18-20. Under this misreading of *Buckley*, the facts did not matter.

In each instance the Circuit Court analyzed the City's proffer of facts related to this appeal, it rejected those facts not on their sufficiency but "as a matter of law." App. 19, 20, 21, 22. In addressing Cincinnati's interest in preventing corruption and the appearance of corruption, the Sixth Circuit states: "[W]ere we to consider the City's factual allegations, it has failed to present any evidence that spending limits are necessitated by the failure of contribution limits." App. 20. As it had the right to do, Cincinnati relied upon the twenty-two years of federal election experience with contribution limits and unlimited campaign spending to demonstrate the necessity for its spending limits. *Renton v. Playtime Theatres, Inc.*, 474 U.S. 41, 51-52 (1986).

The Sixth Circuit dismissed Cincinnati's interest in preserving the time of elected officials to carry out their representative duties with entirely circular reasoning. It states:

> The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, *which admittedly detracts an officeholder from doing her job*, cannot serve as a basis for limiting campaign spending. App. 22-23 (emphasis added).

As to Cincinnati's interest in preventing the blackout phenomenon with respect to television advertising time, the Sixth Circuit fails to address that interest in any way. The Circuit Court plainly did not weigh the sufficiency of the evidence proffered by the City; rather, it categorically rejected it as a matter of law.

B. Petitioners Are Not Limited to the Legislative Record to Support the Compelling Interests That Justify Spending Limits.

Respondents repeatedly urge an incorrect standard upon the Court, contending that "a compelling interest cannot properly be advanced by the *government's* counsel if it was not relied upon by the governmental body at the time of enactment." Opp. Br. at 20, 28-29.[1] As support for this notion, they cite only *United States v. Virginia*, 116 S. Ct. 2264 (1996), and *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996), two entirely inapposite cases that address the Fourteenth Amendment's prohibition of legislative discrimination.[2] Respondents mistakenly assume that the

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[1] The Brief in Opposition to Petition for a Writ of Certiorari will be referred to as "Opp. Br."

[2] Respondents' citations are profoundly disingenuous. Only three sentences before the quotation selected by Respondents, the Court unequivocally explained that it was announcing "directions for cases of official classification based

judicial inquiry into legislative purposes described in the Court's cases analyzing statutory differential treatment based on race, gender or religion[3] must also be made in a case involving a narrowly tailored, non-discriminatory regulation of campaign expenditures.[4] However, the standard for the analysis of campaign spending limits is well established: the government must demonstrate that the ordinance is "narrowly tailored to serve a compelling state interest." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citing *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (per curiam)). This standard does not mandate an inquiry into the City Council's actual deliberations. On the contrary, such an inquiry has been specifically disavowed. The Court reviews legislation that allegedly violates the First Amendment in light of all available evidence, and not merely by reference to recorded excerpts of the legislative history. *See Sable Communications v. F.E.C.*, 492 U.S. 115, 133 (1989) (Scalia, J. concurring).

In First Amendment cases, the Court regularly looks beyond legislative history, relying on its own value judgments, publicly available material, and the experience of other jurisdictions to find support for compelling state

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on gender" under the Fourteenth Amendment. *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996).

[3] *E.g., United States v. Virginia*, 116 S. Ct. 2264 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 730 (1982); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 223-224 (1977) (Stevens, J., concurring).

[4] The court does look to legislative intention for the limited purpose of determining a statute's content-neutrality. *See e.g. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

interests. As this Court noted in *Florida Bar Assoc. v. Went For It*, 515 U.S. 618, 628-29 (1995):

> "[I]n . . . First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . *or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense,' Burson v. Freeman*, 504 U.S. 191, 211, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992)." (emphasis added and other internal citations omitted).

Accordingly, the City may produce evidence supporting the constitutionality of its ordinance, even it was not explicitly "relied upon . . . at the time of enactment."[5] Opp. Br. at 20.

C. Cincinnati's Interest in Preserving the Time of Elected Officials to Govern is New and Different From the Interests Presented in *Buckley*.

Cincinnati has presented a new and compelling governmental interest that justifies its campaign spending limits: the interest in freeing its elected officials from the pressures of fundraising to ensure that they are able to carry out their representative duties without interference. Contrary to Respondents' claims, this Court in *Buckley* was never presented with and never considered this interest in addressing the congressional campaign spending limits.

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[5] Even if this Court were to require an inquiry into the legislative justifications, the government may offer additional factual evidence amassed following enactment of the ordinance in question. *See Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3d. Cir 1993); *Harrison & Burrowes Bridge Constructors v. Cuomo*, 981 F.2d 50 (2d. Cir. 1992); *Coral Construction Company v. King County*, 941 F.2d 910 (9th Cir. 1991).

To buttress the claim that the *Buckley* Court weighed this interest, respondents rely entirely on language in Justice White's dissenting opinion which noted that spending limits would "ease the candidate's understandable obsession with fundraising, and so free him and his staff to communicate in more places and ways unconnected with the fundraising function." Opp. Br. at 18, quoting *Buckley*, 424 U.S. at 265 (White, J., dissenting). Yet, the interest Justice White identifies does not match the interest presented in this case. Cincinnati instead focuses on preserving the time *elected officials* need to carry out their official duties. The "independent interest in freeing officeholders from the pressures of fundraising so they can perform their duties," App. 29 (Judge Cohn, concurring), warrants consideration by this Court.

The authorities cited by the City, which are in the public record, concerning the twenty-two years of experience of unlimited campaign spending in federal elections and the associated burdens of fundraising by elected officials provide added weight to Cincinnati's new and compelling governmental interest justifying its campaign spending limits. Pet. at 22-23; *id.* at 23, n.29.

D. The *Buckley* Record Did Not Include the Evidence of a Blackout Phenomenon.

Respondents and the Sixth Circuit ignore the gravamen of the blackout phenomenon cited by petitioners as an independent interest justifying spending limits. The issue is not a matter of unequal resources. Rather, the City has shown that what the *Buckley* Court called an "indispensable instrument[ ] of effective political speech" can be, and is, *monopolized* by individual candidates. *Buckley*, 424 U.S. at 19. As the result of "excessive purchases" of television advertising (R.No.38, Galvin Aff., 4),

some candidates' access to the medium is completely denied. In a limited medium, where the viewing habits of the electorate are quantified for commercial purposes, individual candidates can and do dominate the forum to the exclusion of others. These facts undermine the *Buckley* Court's critical assumption that more campaign speech is always available through more spending. The City has shown that spending limits are necessary precisely "to assure the unfettered interchange of ideas" that the First Amendment requires. *Buckley*, 424 U.S. at 14 (citing *Roth v. United States*, 354 U.S. 476 (1957)).

Respondents claim that "[t]here is . . . no evidence supporting the allegation of a systemic 'blackout' or that such a 'blackout' has any detrimental effect on candidates." Opp. Br. at 25. This is untrue. The record in this case includes expert evidence that, in Cincinnati city council elections, candidates with large sums of money early in the election season engage in media campaigns which "have the effect of preempting the right of other, less well-funded candidates [from] purchas[ing] the most valuable advertising spots." R.No.38, Galvin Aff., 4. Further, these media campaigns, involving "unnecessarily excessive quantities of television advertisements" and creating "an effective monopoly on the most valuable advertising time," "effectively restrict[ ] access to voters for less well-funded candidates." *Id.* at 4-6. This Court in *Buckley* was not presented with and did not consider this interest and these facts.

At the very least, Respondents' arguments highlight that there are "genuine issues of material fact" on the blackout phenomenon in Cincinnati which must be resolved at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

E. This Court in *Buckley* Did Not Close the Door to New Facts Demonstrating the Necessity for Spending Limits to Address the Compelling Governmental Interest of Preventing Corruption and the Appearance of Corruption.

Respondents repeat the error of the Sixth Circuit's ruling in claiming that "*Buckley*'s invalidation of electoral limits was not dependent on any specific record evidence . . . " Opp. Br. at 3. This Court in *Buckley* specifically looked to the record before it and found:

> There is no indication that the substantial criminal penalties for violating contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions. *Buckley*, 424 U.S. at 55-56.

The record in this case presents new facts which show that contribution limits alone have proved insufficient to address the compelling governmental interest in preventing corruption and the appearance of corruption in the electoral process. Pet. at 14-21.

Respondents claim that "the City can provide no evidence suggesting that the absence of spending limits, as opposed to contribution restrictions, has caused any of the public dissatisfaction they identify." Opp. Br. at 23. This too is untrue. The City presented expert evidence of a pervasive public perception of corruption in Cincinnati with respect to the city council election process *directly tied to unlimited campaign spending*. Pet. at 17, n.24, citing R.No.38, Deardourff Aff., 9-10. The *Buckley* record did not include this evidence.

Respondents also claim that "[t]here is not a scintilla of evidence . . . that spending caps will somehow reduce large donor influence . . . " Opp. Br. at 4. Yet, respondents stipulated in the record that "the rise in the overall cost of

city council races *has caused* a rise in the influence of wealthy donors in the City's elections, with such donors increasingly dominating the campaign fundraising process." R.No.38, Statement of Facts, No.9, 4; Makinson Aff., 6-7. If so, it follows that campaign spending limits would reduce large-donor influence and the dangers of corruption associated with that influence.

Further, the federal election experience of the past twenty-two years demonstrates that unlimited campaign spending fuels the pressure to evade contribution limits. Pet. at 18-19, n.25-26. Respondents contend that "[a]ll we have here, as in *Buckley*, is a legislative prediction that expenditure limitations will 'reduce the incentive' to violate contribution ceilings." Opp. Br. at 12. Here, in fact, we have much more: twenty-two years of federal election experience with contribution limits and unlimited campaign spending to "support[ ] the reasonableness of [the City's] predictive judgment" that spending limits are necessary. *See Turner Broadcasting System Inc. v. FCC*, 117 S. Ct. 1174, 1193 (1997). Respondents' claim that the effective answer to this experience "is to close [the] loopholes," Opp. Br. at 5, presents a genuine issue of material fact to be resolved at trial.

II. IF *BUCKLEY* HELD THAT CAMPAIGN SPENDING LIMITS ARE *PER SE* UNCONSTITUTIONAL, THIS COURT SHOULD NOW REVISIT THAT RULING.

Respondents contend that Cincinnati does not ask this Court to revisit *Buckley*. Opp. Br. at 26. The petition makes clear, however, that if *Buckley* declared all campaign spending limits *per se* unconstitutional and closed the door to new facts, this Court should now reconsider that ruling based on changed circumstances associated

with unlimited campaign spending. Pet. at 26-29. When changed circumstances "impose new obligations," this Court has recognized its "constitutional duty" to overrule a prior case. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992).

CONCLUSION

For the reasons stated in our petition, as well as in this reply, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

JOHN C. BONIFAZ
Counsel of Record
BRENDA WRIGHT
GREGORY G. LUKE
National Voting Rights Institute
294 Washington Street, Suite 713
Boston, Massachusetts 02108
(617) 368-9100
(617) 368-9101 FAX

FAY D. DUPUIS
City Solicitor
KARL P. KADON, III
Deputy City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3334
(513) 352-1515 FAX

Attorneys for Petitioners